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Finding balance between the competing interests of national and European Union law and economic and social policies through the posted workers directive

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**FINDING BALANCE BETWEEN THE COMPETING
INTERESTS OF NATIONAL AND EUROPEAN UNION LAW
AND ECONOMIC AND SOCIAL POLICIES THROUGH THE
POSTED WORKERS DIRECTIVE**

Stefanie Ripley

Thesis submitted for the fulfilment of the Degree of Doctor of
Philosophy

King's College London

2013

Abstract

The objective and purpose of this PhD is to provide pragmatic solutions to the Posted Workers Directive 96/71/EC.¹ This European Union legislation is designed to govern a unique category of worker that moves throughout the internal market temporarily under the provision of services. The Directive was created to protect workers' rights, combat social dumping by ensuring a climate of fair competition and promote the transnational provision of services. In practice, it has failed to fulfil its objectives, as seen by the *Laval Triplet*.² Therefore, following a thorough analysis of the issues that are intrinsic to the Directive itself and also highlight wider issues such as the competing interests of the internal market and national labour law as well as the conflicting economic and social policy interests, this thesis will provide legislative solutions which will constitute the requisite original contribution to knowledge.

The thesis is composed of five parts, beginning with the Introduction and ending with the Conclusions. The central Chapters follow the chronological order of the Directive's story as follows: Chapter 1 details why and how the Directive was created including an analysis of the early case law; Chapter 2 analyses the issues associated with the Directive and it offers an original critique of the Court's interpretation of the Directive; and Chapter 3 reviews the solutions that have already been suggested by the EU Institutions, the European Social Partners and the academic literature before providing my own input to the field. The form of methodology adopted throughout is therefore doctrinal.

¹ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, [1997] OJ L18/1.

² Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767; Case C-346/06 *Dirk Rüffert v Land Niedersachsen* [2008] ECR I-1989; Case C-319/06 *Commission of the European Communities v Grand Duchy of Luxembourg* [2008] ECR I-4323.

Contents

Title Page	1
Abstract	2
Contents	3
Dedication and Acknowledgements	8
Abbreviations	10
INTRODUCTION	12
I. The Research Question and Methodology	12
II. The Format of the PhD	14
(i) Chapter 1: The Posted Workers Directive	14
(ii) Chapter 2: The Issues Relating to the Directive	14
(iii) Chapter 3: The Proposed Solutions to the Directive	15
(iv) Conclusions	15
CHAPTER 1: THE POSTED WORKERS DIRECTIVE	17
Part 1: The Directive's Creation	17
I. Inspiration for the Posted Workers Directive	17
II. Drafting the Posted Workers Directive	20
(i) Which Law Applies?	21
(ii) Lack of Clarity	24
(iii) Three Month Threshold	26
(iv) Erga Omnes Effect	28
III. Adoption of the Posted Workers Directive	30
(i) Social Security	33
(ii) Jurisdiction	34
IV. Interim Conclusion	35
Part 2: The Court's Initial Interpretation	37
I. The Directive's Objectives: Guidance for the Court	37
II. The First Case Law Following the Directive's Adoption	39

(i) Has the Directive Made a Difference?	39
(ii) Going Further: Contradicting the Provisions of the Directive?	40
(iii) Protecting the Domestic Labour Market	42
(iv) Interim Conclusion	46
III. The Early Case Law Invoking the Directive	47
(i) Joint and Several Liability	49
(ii) Infringement Actions	51
IV. A Conceptual Shift in the Court's Interpretation of the Directive	54
(i) What Caused this Conceptual Shift? Lead up to the Laval Quartet	60
 CHAPTER 2: THE ISSUES RELATING TO THE DIRECTIVE	 65
 I. Introduction	 65
II. Laval Quartet	65
III. Laval Triplet	69
IV. Laval	69
A. Competence	76
(i) The Law on Collective Action and Collective Bargaining	78
(ii) The Law on Pay	80
(iii) Article 28 Charter	82
(iv) Albany	85
(v) Interim Conclusion	87
B. Judicial Activism	88
(i) The Collective Agreement	89
(ii) Interim Conclusion	93
C. Horizontal Direct Effect	94
(i) Horizontal Direct Effect of the Treaties	95
(ii) Horizontal Direct Effect of the Directive	98
(iii) Whether Sweden Transposed the Directive Incorrectly	102
(iv) Public Law or Private Law?	104
(v) The Proportionality Test	106
(vi) Interim Conclusion	109
D. EU Law versus National Law	110
(i) Collective Action in the Swedish Labour System	110

(ii) Labour Standards	113
(iii) Social Rights as an Obstacle to Economic Free Movement	116
(iv) Interim Conclusion	120
E. Local Unemployment at Times of Recession	123
(i) “British Jobs for British Workers”	123
(ii) An Obligation to use Local Labour	126
(iii) Are there Enough Workers to Fill the Demands?	128
(iv) Interim Conclusion	130
V. Rüffert	132
(i) The Facts	132
(ii) The Collective Agreement: “Universally Applicable”	134
(iii) The More Favourable Term and Public Procurement	135
(iv) Potential Justifications	138
(v) Concluding Rüffert	139
VI. Commission v Luxembourg	142
(i) The Facts	143
(ii) The Advocate General’s Opinion	145
(iii) Concluding Commission v Luxembourg	146
VII. Abuse of the Directive	147
(i) Lack of Data on Posted Workers	148
(ii) Letter-Box Companies	149
(iii) Circumventing National Law	150
(iv) Interim Conclusion	151
VIII. Conclusion	152
(i) Chapter Summary	152
(ii) Laval Triplet and the “New Approach”	154
 CHAPTER 3: THE PROPOSED SOLUTIONS TO THE DIRECTIVE	 157
I. Introduction	157
II. Solution Number One: Amend the Directive	158
(i) Should the Directive become a Regulation?	160
(ii) Legal Basis of the Directive	162
(iii) Defining the Directive’s Scope	169

(iv) Defining a Posted Worker	171
(v) Clarity of Terms and Conditions of Employment	173
(vi) Minimum Rate of Pay	173
(vii) More Favourable Terms and Conditions of Employment	177
(viii) Collective Agreements and their Applicability	179
(ix) Collective Action	185
(x) Public Policy	188
(xi) Monitoring Compliance with the Directive	197
(xii) Interim Conclusion	200
III. Solution Number Two: Adopt the Enforcement Directive	205
(i) Lead Up to the Legislative Initiative	205
(ii) The Enforcement Directive	209
Chapter I: General Provisions	214
Chapter II: Access to Information	217
Chapter III: Administrative Cooperation	217
Chapter IV: Monitoring Compliance	218
Chapter V: Enforcement	219
Chapter VI: Cross-border Enforcement of Administrative Fines and Penalties	221
Chapter VII: Final Provisions	222
(iii) Responses to the Enforcement Directive	222
(iv) The Monti II Regulation	229
(v) Responses to the Monti II Regulation	232
(vi) Interim Conclusion	239
IV. Solution Number Three: No Changes to the Directive	241
(i) Article 6(1) TEU	241
(ii) Article 6(2) TEU	244
(iii) Article 6(3) TEU	246
(iv) The Court's "Newer" Approach?	249
(v) The Court's Role	258
(vi) Interim Conclusion	260
V. Conclusion	261
CONCLUSIONS	265

I. The Answer to the Research Question	265
II. Wider Issues	266
III. Final Comments	268
Bibliography	270

Dedication

This PhD is dedicated to my Dad, Andy Ripley OBE. My Dad always valued the importance and necessity of education and continued to encourage me, knowing that this was a path I had to pursue. Even without my magnificent Dad here, he has proved a constant source of inspiration and his advice and guidance will always remain with me, as such, I have given this PhD my best shot and hope always to make him proud.

“Life is too brilliant not to give it your best shot forever.”³

Acknowledgements

First and foremost, I would like to thank my incredible Mum, Elisabeth, for her endless support – both practical and emotional – without which this PhD could not have been completed. It is because of my parents that I have been able to make this dream a reality. I would also love to thank my brother, Mouse, for his motivation and general brilliance, my sister, Clauds, for all of her love and support and my love, Dominik, for his patience, kindness and invaluable advice. I love you all immensely.

From King’s College London, I would like to thank my supervisor, Professor Andrea Biondi, for his advice and guidance which has inspired my research and given me confidence in my ideas, and also, for his friendship. My second supervisor, Professor Keith Ewing, for inviting me to join him at the interviews he conducted as part of research for a Commission study on the Posted Workers Directive in 2010, where I gained a more practical insight into the area. Finally, I would like to thank my friends in the PhD community and the administrative and academic staff at King’s College London, especially at the Centre of European Law, for making this experience so enjoyable.

I have gained a huge amount of knowledge and inspiration from attending conferences all over Europe and the Summer School programme at the Academy of European Law at the EUI in Florence. I was lucky enough to spend time as a

³ Ripley, Andy, *Ripley’s World: The Rugby Icon’s Ultimate Victory Over Cancer* (2007) Mainstream Publishing, 214.

guest researcher at the University of Innsbruck in Austria during my final year and thanks are due to Dr Andreas Müller for his words of wisdom and encouragement at this time.

The experience of undertaking a PhD has been a life-long goal and I am thrilled that I have been able to complete this project. In a time where social media is growing exponentially and everybody seems to have a platform in which they may publish their opinion, the discipline of a PhD; to dedicate yourself to your subject for years and gain a true knowledge of the insight and voice of others before you can advocate your own thoughts, seems more relevant than ever. Also, in an age whereby women still do not have access to education the world over, highlights the significance that I have been able to pursue my studies all of my life and this has most certainly been a privilege.

Abbreviations

ACAS	Advisory, Conciliation and Arbitration Service
AEntG	German Law on the Posting of Workers
AG	Advocate General
BNP	British National Party
CEEP	European Centre of Employers and Enterprises providing Public services
Charter	Charter of Fundamental Rights of the European Union
CJEL	Columbia Journal of European Law
CML Rev	Common Market Law Review
Court/ECJ	European Court of Justice
CSR	Corporate Social Responsibility
CUP	Cambridge University Press
DG	Directorate General
Directive/PWD	Posted Workers Directive 96/71/EC
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EESC	European Economic and Social Committee
EFBWW	European Federation of Building and Woodworkers
EFTA	European Free Trade Area
EHRLR	European Human Rights Law Review
EICLR	European Institute for Construction Labour Research
EJSS	European Journal of Social Security
ELJ	European Law Journal
ELLJ	European Labour Law Journal
EL Rev	European Law Review
EMU	Economic and Monetary Union
EPL	European Public Law
ESA	EFTA Surveillance Authority
ETUC	European Trade Union Confederation
EU/Union	European Union
EWHC	High Court of Justice of England and Wales
FIEC	European Construction Industry Federation
FOC	Flag of Convenience
FSU	Finnish Seamen's Union
HHJ	His Honour Judge
ICCLR	International Company and Commercial Law Review

IER	The Institute of Employment Rights
ILJ	Industrial Law Journal
ILO	International Labour Organization
IMI	Internal Market Information System
Int J Comp LLIR	International Journal of Comparative Labour Law and Industrial Relations
IRJ	Industrial Relations Journal
ITF	International Transport Workers' Federation
JSSL	Journal of Social Security Law
MBL	Swedish Law on workers' participation in decisions
MEP	Member of the European Parliament
NILQ	Northern Ireland Legal Quarterly
OMC	Open Method of Coordination
OUP	Oxford University Press
QMV	Qualified Majority Voting
SMEs	Small and Medium Enterprises
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UEAPME	European Association of Craft, Small and Medium-sized Enterprises

Introduction

I. The Research Question and Methodology

This thesis was originally inspired by the fascinating consequences stemming from the clash between European Union (EU) law and the national law of the Member States. The EU appears to be ever-expanding⁴ and this expansion highlights a growing market with increasing economic and social opportunities. Nevertheless, it is imperative that amongst these developments the Member States' interests and differences must not be eroded. Ultimately, it is these differences that we embrace and are drawn to as other Member States offer something different from our own. The place of national law in the context of the primacy of Union law is a timeless issue and although it motivated the idea for this thesis, it was clear from the start that the complexities elicited from the clash of laws within a supranational entity are so vast that this thesis needed to examine the relevant issues through the lens of a specific case study. This case study is intended to give a greater focus and a tangible reference point that will confer real substance to the value of this PhD.

The choice of case study was influenced, not only by its subject matter, but also by the fact that I started the thesis in October 2009 which was a very exciting and dynamic time for EU law; months away from the anticipated Lisbon Treaty coming into effect, which would amend the Union's constitutional framework, coupled with the legally binding status of the Charter of Fundamental Rights of the European Union (the Charter) that promised change in respect of social policies from the Union's economic origins and finally, in 2009 academic debate on EU law was largely dominated by, arguably, one of the most important groups of EU cases of the early twenty-first century: the *Laval* Quartet.⁵ The case study that has been selected is the Posted Workers Directive 96/71/EC (the

⁴ Croatia acceded to the EU on 1 July 2013, increasing Union membership to a total of 28 Member States.

⁵ Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779; Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767; Case C-346/06 *Dirk Rüffert v Land Niedersachsen* [2008] ECR I-1989; Case C-319/06 *Commission v Luxembourg* [2008] ECR I-4323.

Directive)⁶ because it elicits all of these most pertinent developments and thereby functions as the perfect tool to consider the broader issues of the European Union whilst also necessitating its own intrinsic review.

The Directive governs the temporary movement of labour across the EU, hence the requirement that workers are “posted”. The Directive is extremely topical both in the current political and judicial spheres as this unique category of worker comes under Article 56 Treaty on the Functioning of the European Union (TFEU) on service provision, therefore, in principal, home State rules apply which aggravates the potential to undercut the local workers of the host State during the period of posting. The issues have truly come to light during the economic recession as the commercial opportunity of using cheaper labour is made available by the Directive and is certainly one of the benefits of the internal market for undertakings, however, the effect of this is that at times of recession when local unemployment is at its highest, the threat of social dumping has been intensified. This was exacerbated by the fact that in 2004 the EU experienced an explosive enlargement with ten countries acceding to the Union, predominantly from Eastern Europe. In light of the battle played out in the Directive between the competing interests of national and Union law and also economic and social policies, this thesis asks: how can the issues associated with the Posted Workers Directive best be resolved?

In finding the answer to my research question the following sources have been used: the legislation itself; the Court’s judgments; the Advocate Generals’ Opinions; documents from the European social partners and the EU Institutions; and the academic doctrine. Accordingly, the methodology adopted is doctrinal and although the doctrine primarily focuses on the practical elements involved, the thesis also intends to contribute to the more general public policy debate surrounding these issues. The context in which this thesis has been written is principally from an EU law perspective and secondarily, a labour law perspective, as my starting position has always been that of an EU law researcher and the topic overlaps with European labour law. Finally, the law is stated as of 30 September 2013.

⁶ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, [1997] OJ L18/1.

II. The Format of the PhD

(i) Chapter 1: The Posted Workers Directive

The first Chapter is separated into two Parts: Part 1 details how and why the Directive was created. Prior to the Directive there was no legislation governing posted workers, therefore, this Part examines the early impetus for legislative guidance in the area followed by the issues that arose during its drafting, issues that would reveal themselves in practice following the Directive's adoption. This Part concludes with the adoption of the Directive and an explanation of its most prominent provisions in order to set the scene for the rest of the thesis.

Part 2 discusses how the Directive was initially interpreted by the Court, from the case law immediately following its adoption through to the cases that invoked the Directive following transposition. In these early cases there was an evolution in the Court's interpretation from revealing a reluctance to rely on the provisions of the Directive at first to then using the Directive as it was intended by showing a suitable balance of all of the Directive's objectives. The final case discussed in this Chapter, *Commission v Germany*,⁷ draws attention to the very first sign that the Court was willing to interpret the Directive solely in accordance with its legal basis; the freedom to provide services, above all else. From this point to the *Laval* Quartet, that is discussed in the next Chapter, there was a perceptible shift in the Court's interpretation. Therefore, this Chapter concludes with the reasons that caused this shift.

(ii) Chapter 2: The Issues Relating to the Directive

The primary aim of this thesis is to find solutions to the problems of the Directive, in order to achieve that result, it is necessary first to reveal all of the problems and explore them in-depth. This Chapter centres around *Laval* as the case exemplifies the predominant issues relating to the Directive. There are five main areas that are explored in depth: (i) competence; (ii) judicial activism; (iii) horizontal direct effect; (iv) EU law versus national law; and (v) local unemployment at times of

⁷ Case C-490/04 *Commission of the European Communities v Federal Republic of Germany* [2007] ECR I-6095.

recession. This Chapter provides an original critique of the Court's interpretation in *Laval*, revealing that it was *ultra vires* by relying on a provision concerning the applicability of collective agreements that is in fact obsolete.

In showing that *Laval* was not an aberration of the Court, the Chapter then discusses the issues arising from *Rüffert* and *Commission v Luxembourg*. This is followed by a discussion of a UK case that reveals how the Directive has been (mis)used in order to circumvent national immigration law. The Chapter concludes with a final word on the failings of the Court in interpreting the Directive that has heightened the issues and confirmed the need for change, thereby paving the way for the proposed solutions in Chapter 3.

(iii) Chapter 3: The Proposed Solutions to the Directive

Chapter 3 collates all of the proposed solutions and then presents my own. There are three solutions that are considered: (i) amend the Directive, which directly addresses all of the issues identified in Chapter 2 and responds accordingly in order to shape the current Directive into the best version of itself. This proposal also fulfils a sub-aim of the thesis by providing a valid public policy justification intended to protect social values that are closely connected to national interests; (ii) adopt the Commission's proposed Enforcement Directive;⁸ or (iii) do not make any changes to the Directive but simply rely on the legislative changes that have been made to EU law since *Laval* and its progeny.

(iv) Conclusions

This final part of the thesis confirms the legislative solution that is held as being the most efficient and necessary response in light of the issues that have been examined and the interests of all the major stakeholders. The final comments assess whether there is the political will to implement the solution proposed by this thesis.

⁸ Commission, 'Proposal for a Directive of the European Parliament and of the Council on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services' COM(2012) 131 final.

The PhD considers the wider issues demonstrated by connecting the influence of the issues and proposed solutions to the broader picture of the EU, thus coming full circle and reflecting on the primary motivation of the thesis through the more focused and specific lens of this case study.

Chapter 1: The Posted Workers Directive

Part 1: The Directive's Creation

I. Inspiration for the Posted Workers Directive

The Directive's inception can be dated back to the 1989 Community Charter of the Fundamental Social Rights of Workers (Charter of Social Rights). In the European Union, at this time, there was a determination, motivated by the Single European Act's commitment, to establish the Single European Market by the end of 1992, consequently, the direction of the EU was economically driven. Therefore, despite its non-binding effect, the Charter of Social Rights filled a potential void respecting the social aspects within the Union, "in the context of the establishment of the single European market, the same importance must be attached to the social aspects as to the economic aspects".⁹

The Charter of Social Rights established the foundations of the European labour law model and it granted an initial platform for social dialogue, "the Charter was instrumental in the launching of initiatives in employment and industrial relations policy, which produced a number of directives during the 1990s."¹⁰ This included the Directive, "The Posted Workers Directive represented one of the last pieces of unfinished business from the 1989 Social Charter action programme, and had been grinding slowly through the Community law-making process since 1991."¹¹ This Charter clearly inspired elements of the Directive,¹² however, the most direct influence on the creation of the Directive must be credited to *Rush Portuguesa*;¹³ a case that was determined the year after the Charter of Social Rights was adopted.

⁹ Para. 2 of the Preamble, Commission of the European Communities, 'Community Charter of Fundamental Social Rights (Draft)' COM(89) 471 final.

¹⁰ Eurofound, 'Community Charter of the Fundamental Social Rights of Workers': <http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/communitycharterofthefundamentalsocialrightsofworkers.htm> [accessed 20 February 2012].

¹¹ 'European Communities: progress at September council' (1996) European Industrial Relations Review, 274: 14-15, 14.

¹² The Charter of Social Rights established the core principles on which the European labour law model is based, including employment and remuneration, equal treatment for men and women, health protection and safety at the workplace; all of which are expressly provided for under Article 3(1) Directive.

¹³ Case C-113/89 *Rush Portuguesa Lda v Office national d'immigration* [1990] ECR I-1417.

Rush Portuguesa was an undertaking established in Portugal. As Portugal had only recently acceded to the EU, on 1 January 1986, Rush Portuguesa was subject to the rules of the transitional period. Therefore, when it posted its workers to France, for the construction of a railway line, the Director of the Office national d'immigration in France ordered Rush Portuguesa to pay a special contribution due to employing foreign workers from non-Member States in breach of the Labour Code. That decision was annulled. However, the Office national d'immigration argued that the freedom to provide services does not extend to all employees of the service provider; as they are subject to the arrangements applicable to workers from non-Member States under the transitional provisions laid down in the Act of Accession as regards the free movement of workers. The Court disagreed and held that Rush Portuguesa was permitted to post its workers to France and the French authority could not impose any conditions on Rush Portuguesa's workers in relation to the recruitment of manpower in situ or the obtaining of work permits.

The Court, in its judgment, attempted to find some equilibrium between the competing interests of the host State and the service provider. As a new Member State in an enlarging Union, it was feared that Portugal would be able to send their workers to the old Member States, under the free movement provisions, but could continue to maintain their lower wage and labour standards, thereby retaining a competitive advantage and undercutting the workforce of the host State, "The Directive, which was drafted in 1991, was partially intended to allay the fears of policymakers in high-wage economies that their markets would be flooded by increasing numbers of lower paid workers."¹⁴ In the *Rush Portuguesa* case the French Government feared an influx of Portuguese workers; there was a concern that Portuguese service providers would be able to circumvent "the provisions of Article 216 of the Act of Accession under the cloak of a provision of services."¹⁵ However, the Court held that there was no abuse of Union law and the additional conditions imposed on the Portuguese workers would have amounted to a restriction on the freedom to provide services which is prohibited by Article 56 TFEU. Therefore, the Court upheld the freedom to provide services, in the

¹⁴ Kennett and Nesbitt, 'The consequences of employing a mobile workforce – a patchwork of protections' (2000) ICCLR, 11(12): 399-406, 400.

¹⁵ *Rush Portuguesa*, op. cit., Summary to the judgment.

interests of the service provider, on the condition that the service provider respects the local legislation and collective agreements of the host State, so as to appease the host State's concerns of social dumping.

This case is the seminal judgment on posted workers and is of paramount importance to the creation of the Directive; it permitted the host State to extend its legislation or collective labour agreements to posted workers sent to its territory:

“Finally, it should be stated, in response to the concern expressed in this connection by the French Government, that Community law does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established nor does Community law prohibit Member States from enforcing those rules by appropriate means.”¹⁶

Interestingly, it has been said that the Court's decision to extend the host State's laws to the posted workers was not a material part of the judgment and therefore not requisite to the decision, “the Court, committing a basic error of the craft of judicial decision-making, answered a question which was not necessary for its decision”.¹⁷ The substance of the case concerned whether a Portuguese service provider could move its workforce for the period of posting and if the authorities could impose any conditions on that service provider relating to the recruitment of manpower or the obtaining of work permits. Therefore, in establishing that the host State could extend its own laws to the posted workers during their deployment suggests that the Court was guilty of judicial activism here. However, I do not believe that to be true; a more plausible explanation is that what was essentially *obiter dictum* in this case has been transplanted by the legislator and applied as the founding principle to the broader context of posted workers. The Directive codified the ruling by stating that host States could extend the terms and conditions set out in Article 3(1) Directive to posted workers by the means provided there. From a subjective point of view, this part of the judgment was

¹⁶ Ibid., [18]; see also Case 62/81 *Société anonyme de droit français Seco and Société anonyme de droit français Desquenne & Giral v Etablissement d'assurance contre la vieillesse et l'invalidité* [1982] ECR 223, [14].

¹⁷ Davies, ‘The posted workers Directive and the EC Treaty’ (2002) ILJ, 31(3): 298-306, 300.

obiter to the final ruling, but to state that it “was not necessary” fails to appreciate the tensions that were building in regard to the threat of greater competition for jobs and the differing wage and labour standards, as highlighted by an enlarging Union; Spain and Portugal had just acceded to the Union in 1986. Also, in 1985 and 1990 two Schengen Agreements were signed between all the Member States, excluding Ireland and the UK, consequently removing frontier checks and establishing a common external frontier, thereby adding to a greater sense of vulnerability in respect of the limits to national protection. Accordingly, the posting of workers highlights a politically sensitive area that was not, at the time, governed by specific legislation.

Prior to the Directive’s adoption, certain Member States had already established their own national legislation concerning posted workers,¹⁸ however, *Rush Portuguesa* highlighted the need for a Union-wide statutory response in respect of governing the cross-border temporary movement of labour. This case was therefore the true catalyst to the Directive’s creation.

II. Drafting the Posted Workers Directive

Rush Portuguesa acted as the prologue to the Directive as the year after the ruling, the Commission presented its first Proposal for the Directive.¹⁹ When preparing this Proposal, the Commission conducted a series of consultation meetings with employers, trade unions and individual organisations and it was concluded that, “The workers’ trade union organisations support the action by the Commission... Employers in certain sectors, such as the construction industry, which are faced with problems concerning the posting of workers, are in favour of Community action.”²⁰ This confirms that secondary legislation to govern the posting of workers was required and following the 1989 Charter of Social Rights, it was presented at the right time and in the right environment. However, it took five years from the Directive’s Proposal to its final adoption in 1996, which included

¹⁸ Including: Germany (Law of 26 February 1996 on the posting of workers); Austria (Bundesgesetzblatt I 1995/895); and France (Law of 20 December 1993 and Implementing Decree of 11 July 1994).

¹⁹ Commission, ‘Proposal for a Council Directive concerning the posting of workers in the framework of the provision of services’ COM(1991) 230 final – SYN 346.

²⁰ *Ibid.*, 26.

an amended Proposal in 1993.²¹ The fate of the Directive was jointly in the hands of the Council of the EU and the European Parliament, due to the legal basis that stipulated under Article 53(1) TFEU the Directive was subject to the ordinary legislative procedure (previously the co-decision procedure). The lead up to the adoption of the Directive was long and eventful as it was revealed during the co-decision procedure that this Directive elicited more politically sensitive matters than first imagined. There were four major points of contention that arose and necessitate discussion here: (i) which law applies?; (ii) lack of clarity; (iii) three month threshold; (iv) *erga omnes* effect.

(i) Which Law Applies?

The choice of applicable law presented a difficult predicament; due to their temporary nature, prior case law has established that posted workers come within the provision of services and therefore the service provider cannot be required to comply with all the obligations of an establishment.²² However, *Rush Portuguesa* highlighted the accelerating threat of social dumping in an enlarging Union, which the Commission gave credence to in its Proposal; at the time, in 1990, the highest level of hourly wages in ECU²³ in collective agreements in the construction industry was 18.39 in Denmark and 2.52 in Greece.²⁴ Therefore, if posted workers were entirely subject to the country of origin principle, this would exacerbate the diverging wage and labour conditions across the Member States. The solution offered by the Directive was essentially a compromise, whereby both the home and host State laws apply in part.

The legal basis of the Directive, which has always remained the same, comprises Articles 53(1) and 62 TFEU which binds the Directive to the freedom

²¹ Commission, 'Amended Proposal for a Council Directive concerning the posting of workers in the framework of the provision of services' COM(1993) 225 final – SYN 346.

²² In Case 279/80 *Alfred John Webb* [1981] ECR 3305, the German and Danish Governments submitted that the legislation of the host State must be applied *in toto* to posted workers by virtue of the principle of equality. However, it would impose a double burden on the service provider as they would have to comply with additional rules of the host State which may amount to an administrative and financial burden thereby proving disadvantageous and by no means 'equal' in practice. Thus, the Court held this would amount to a restriction of the fundamental freedom to provide services.

²³ The former official monetary unit of the EU; used to evaluate exchange rates on a common basis.

²⁴ Commission Proposal for Directive COM(1991) 230 final, op. cit., 5.

to provide services, confirming that home State rules apply in general. However, as inspired by *Rush Portuguesa*, the Proposal offered a list of terms and conditions of the host State's employment laws under Article 3(1)(b) Proposal that must be extended to posted workers during the posting. This list has remained effectively the same in the adopted text of the Directive. The terms and conditions of employment reflect the mandatory hardcore terms of the contract that are directly relevant during the period of posting. In essence, a distinction can be made between short and long-term social protection; the short-term benefits that will be accrued during the posting, such as minimum wages and health and safety at work, are governed by the rules of the host State where the posting takes place and the long-term benefits, such as social security benefits, are governed by the rules of the home State where the workers will return after the posting has been completed.

The Directive does not aim to harmonise substantive minimum standards across the Member States, quite the opposite, it requires each Member State to ensure that employers observe national terms and conditions of the host State, "Minimum wage levels, for example, will vary as much across the Community after the Directive as they did before."²⁵ Evidently, this is not a full harmonisation Directive, but it does intend to coordinate the conflict of law rules so that the service provider can abide by the terms of the host State, "In that sense, *this is not a labour law instrument*, but a proposal concerning international private law closely related to the freedom to provide services [emphasis added]."²⁶ It is submitted that by specifying the Directive was not intended to be a labour law instrument, the Commission was making it abundantly clear from the start that the Directive should be interpreted as an internal market instrument, not a labour law instrument and therefore the freedom to provide services is the overriding objective to be fulfilled and consequently the Directive can already be read as a 'maximum', as opposed to a 'minimum' Directive, thereby associating the rules more closely to commercial law as opposed to labour law, "In the labour law domain, minimum protections and international standards can always be improved in favour of workers... In the commercial law field, by contrast, the basic

²⁵ Davies, 'Posted Workers: Single Market or Protection of National Labour Law Systems?' (1997) CML Rev, 34: 571-602, 593.

²⁶ Commission Proposal for Directive COM(1991) 230 final, op. cit., 15.

protections are the maximum limit in order to allow compatibility with the goal of fostering competition; any additions would be regarded as unjustified constraints on the provision of services”.²⁷

In binding posted workers to the provision of services, they are inevitably at an advantage to migrant workers and national host State workers as they maintain their own labour standards in the main, thus, posted workers can potentially undercut the host State workers. Furthermore, posted workers can offer a cheaper service as despite working in a Member State where there may be higher living costs in comparison to their home State, posted workers are only there temporarily and therefore can survive on a lower wage during the period of posting as they do not incur the higher living costs on a permanent daily basis.²⁸

As posted workers come within the scope of service provision, they are not subject to the usual labour market regulations imposed on the free movement of workers or the freedom of establishment. Their access to the host State’s labour market is less burdensome due to the fact that their consequent departure from the host State’s labour market is guaranteed. During this time of co-decision, the Court declared that posted workers are distinct from migrant workers as they “do not in any way seek access to the labour market in that [host] State, *if they return* to their country of origin or residence after completion of their work [emphasis added].”²⁹ The latter part of this sentence provides the condition that where the workers return to their home State qualifies them as not “in any way” accessing the host State’s labour market. It is as if the period of posting does not count; the decisive factor is that they return. However, one cannot nullify the period of posting from time spent in the host State on the condition that at some point the workers return to their home State, for the reason that the period of posting is the

²⁷ Eurofound ‘Posted workers in the European Union’ by Roberto Pedersini and Massimo Pallini, 6 October 2010: <http://www.eurofound.europa.eu/publications/htmlfiles/ef1073.htm> [accessed 11 June 2013], 15.

²⁸ Davies, ‘Posted Workers: Single Market or Protection of National Labour Law Systems?’, op. cit., 601. However, it must also be acknowledged that this is not always the reality for posted workers, as detailed in Cremers, *In search of cheap labour in Europe: Working and living conditions of posted workers* (2011) EICLR, CLR Studies 6, 41. In the UK Lindsey dispute posted workers did not endure the “normal” living costs of the host State as they were kept isolated; living on barges “away from other workers, the union, the local population and surrounding community.” Also, in the French EDF case, a living allowance to cover the service provider’s costs of housing was deducted from wages already at the national minimum wage. Therefore, exploitation of posted workers entails that they are not necessarily always at an advantage to the host State workers, or exposed to the standard living and working conditions of the host State.

²⁹ Case C-43/93 *Raymond Vander Elst v Office des Migrations Internationales* [1994] ECR I-3803, [21].

sole cause of the workers exercising their right of free movement. At this time the Council and Parliament were negotiating the Directive, therefore, one might have argued that the freedom to provide services was not the most suitable legal basis for a category of worker that was not seen to technically enter the host State's labour market and therefore could circumvent all of the regular conditions imposed on workers.

The choice of legal basis is a reoccurring issue throughout this thesis as it embodies the legal, occupational and social issues associated with the Directive. The Parliament has referred to the Directive as “an essential feature of the social dimension of the single market”.³⁰ However, it is submitted that this statement is not entirely accurate when considering the Directive's foundations, “It is the first substantial whole-Community social Directive – that is, based on the Treaty rather than the social policy Agreement annexed to the Maastricht Treaty on European Union”.³¹ It sounds pleasing to call this a “social Directive” but it is submitted that it cannot be this if its legal basis is grounded in economic policies. The legal basis selected does not reflect all of the Directive's objectives as it does not have a legal footing on the social policy provisions of the Treaty, suggesting an apparent lack of social concern. Therefore, despite being inspired by the Charter of Social Rights, the Directive was always primarily designed to be an economic tool, providing an insight into what can be expected from the Court's interpretation of the Directive.

The issue of a lack of social policy in the Directive resonated throughout the drafting process as the Preamble of the Proposal made reference to International Labour Organization (ILO) Convention No. 94 concerning social clauses in public contracts, however, this was not included in the adopted Directive. By omitting this provision the Commission freed itself from certain obligations that might act as an obstacle to the free movement of services in future case law.

(ii) Lack of Clarity

³⁰ European Parliament Resolution on the posting of workers in the framework of the provision of services of 3 July 1995, OJ C166/123.

³¹ ‘European Communities: progress at September council’, op. cit., 14.

In principle, the Proposal was well-received; the Council consulted the Economic and Social Committee on the Proposal for the Directive³² and their Opinion was in favour of the Proposal as the Committee opined that there was a need for legislation in this area at Union level.³³ However, the Committee recommended considerable amendments as despite recognising the need for such a Directive, it foresaw difficulty in its practical implementation. In particular, the Committee identified problems arising from a lack of clarity in identifying the fundamental aim of the Directive.³⁴ This incoherence is evident in the legal basis which is based on the freedom to provide services but the Directive also aims to support fair competition and worker protection which the legal basis does not adequately reflect. The Committee also took issue with Article 53(1) TFEU which makes reference to the self-employed and is deemed unnecessary in respect of posted workers.

Postings can be made either from a service provider to a recipient; or via intra-company transfers; or hiring out workers by a temporary employment agency, provided that in all these instances there is an employment relationship between the undertaking making the posting and the worker during the posting. The Committee expressed that greater clarity of what an “undertaking” constitutes would assist in clarifying the type of activities covered by the Directive.³⁵ Also, in respect of temporary employment agencies and typical service providers, the Directive needs to distinguish the difference between the supply of labour and the supply of services to avoid potential abuse of the law.³⁶

The lack of precision in the mandatory terms and conditions of employment in the Proposal, “is likely to give considerable difficulty in operation.”³⁷ Also, in accordance with Directive 91/533/EEC,³⁸ posted workers are entitled to be fully informed of the terms and conditions of employment that will be applied to them during their posting abroad. Finally, the Committee

³² Opinion of the Economic and Social Committee on the proposal for a Council Directive concerning the posting of workers in the framework of the provision of services (1992) OJ C49/41-42.

³³ Ibid., Section 1.1.

³⁴ Ibid., Section 1.2.

³⁵ Ibid., Section 2.2.

³⁶ Ibid., Section 2.3.

³⁷ Ibid., Section 2.4.1.1.

³⁸ Directive 91/533/EEC of the Council of 14 October 1991 on an employer’s obligation to inform employees of the conditions applicable to the contract or employment relationship [1991] OJ L288/32-35.

recognised the lack of social policy under the terms and conditions of employment and proposed that a social clause should be included in the contract between the service recipient and provider.³⁹

As seen in practice, which will be explored throughout the thesis, the Commission did not adequately heed the Committee's forewarnings and consequently much of the lack of clarity identified here came to light in the case law.

(iii) Three Month Threshold

Article 3(2) Proposal provided that minimum paid holidays and the minimum rate of pay in accordance with the terms and conditions of employment of the host State shall not apply to posted workers when the duration of the posting is less than three months. This provision was vehemently challenged and called on for review by both the Council and the Parliament. The Economic and Social Committee opined that this threshold can lead to an abuse as posted workers could be rotated on a three-monthly basis in order to avoid the obligation of complying with all of the host State's rules.⁴⁰

Following its first reading,⁴¹ the European Parliament approved the Proposal, subject to a number of amendments. The main sticking point, that in fact delayed the completed first reading,⁴² concerned the three month threshold which the Parliament did not support. The Parliament called on the Council to agree that the wages and holidays of posted workers should be governed by the principle of *lex locis*⁴³ and even suggested a 'zero threshold'.⁴⁴ The Commission did not agree

³⁹ Opinion of the Economic and Social Committee on the proposal for a Directive, op. cit., Section 2.7.

⁴⁰ Ibid., Section 2.4.3.1.

⁴¹ Legislative Resolution A3-0022/93 (Cooperation procedure: first reading) embodying the opinion of the European Parliament on the Commission proposal for a Council Directive concerning the posting of workers in the framework of the provision of services, 15.3.93, OJ C72/85.

⁴² This paper provides a detailed description of the Parliament's adoption of the Commission's Proposal: Evju, 'Posting Past and Present: The Posting of Workers Directive – Genesis and Current Contrasts' (2009) FORMULA Working Paper, University of Oslo.

⁴³ European Parliament Resolution on the posting of workers in the framework of the provision of services of 3 July 1995, OJ C166/123.

⁴⁴ European Parliament Resolution on the posting of workers and transfer of pension rights of 4 March 1996, OJ C65/95.

with the zero threshold but a compromise was finally reached and Article 3(2) of the amended Proposal lowered the threshold to one month.

The final Directive concluded that the host State rules under Article 3(1) Directive would apply from the first day of posting, but, added four potential derogations. These are listed under Article 3(2), (3), (4) and (5) Directive. Article 3(2) details the only compulsory exemption: minimum paid annual holidays and minimum rates of pay will not apply to postings lasting eight days or less where these concern skilled workers in assembly and installation work which forms an integral part of a contract for the supply of goods (except where this is in the construction sector). The only compulsory exemption therefore is restricted to eight days; a significant reduction from the original threshold of three months and it applies to a very specific group of skilled workers who will presumably be receiving more than the minimum wage in any case.

Article 3(3), (4) and (5) Directive permit Member States to decide whether or not they wish to apply the minimum rates of pay provision to postings lasting under a month or by means of collective agreements to provide exemptions to postings lasting under a month. It is also left to Member States to decide whether or not they wish to apply minimum paid annual holidays and minimum rates of pay provisions on the grounds that the amount of work to be done during the posting is “not significant”. From a subjective point of view, even though the threshold has been reduced by a third, the rules on applying this threshold are not clear-cut and they appear very arbitrary. Firstly, what does “not significant” mean? And who makes that decision? When it provides that the Member States can decide to opt-out of the mandatory hardcore terms it does not specify which Member State makes this decision; the host State or the home State, also with these exceptions it no longer seems appropriate to refer to the terms as either “mandatory” or “hardcore” – do these derogations in fact re-define the terms as a mere guideline or reference point? Further, the Member States are instructed only to make their decision following consultation with “employers and labour” but again, is this referring to the employers and labour of the home or the host State or both? It is this lack of definition and consequent uncertainty that not only leads to problems in practice but even more troubling than that; an opportunity for service providers to circumvent the rules, post workers unlawfully and excuse themselves from applying the host State’s laws. Before there was legislation in this area the

service providers and recipients had to instinctively rely on cooperation and common sense in order to form a good working relationship with the hope of creating contacts and opportunities in other Member States. However, when there is legislation the parties are not allowed to derogate from the specified rules, so when there are derogations but those derogations are ‘hazy’ this actually gives the contracting parties statutory law to rely on in support of non-compliance. The legislation should assist in clarifying the rules, but instead the lack of clarity in the wording has the effect of legislating, and therefore solidifying, the confusion.

(iv) Erga Omnes Effect

From July to December 1992 the Presidency of the Council was the UK and on 3 December 1992 the Council presented a press release on the proposed Directive.⁴⁵ The Council raised the ongoing issue of the application of collective agreements;⁴⁶ the Proposal stipulated that collective agreements only apply if they cover the whole of the occupation and industry concerned and have an *erga omnes* effect. The Council suggested that collective agreements which apply generally should suffice. This highlights the differing national labour rules of the Member States; certain Member States rely heavily on collective agreements to regulate their system of industrial relations. Take Sweden, as an example, where legislation on minimum wages or guidelines on rates of pay is non-existent; these provisions of the contract are left to be determined by collective agreements.⁴⁷ Therefore, collective agreements can be very specific to the particular contract on the site where it applies and will not necessarily have an *erga omnes* effect, so that the collective agreement would not be applicable to the posted workers and as there is no other provision for the rate of pay the home State rule would apply which could be considerably less than that of the host State. Consequently, the aim of the Directive to bolster fair competition and protect workers’ rights would not be feasible in practice if only collective agreements that have an *erga omnes* effect are applicable. In principle, this thesis commends the Directive’s objectives

⁴⁵ Council of the European Communities, General Secretariat. Press Release, 10519/92 (Presse 231). 1626th Council meeting, Employment and Social Affairs, 3 December 1992.

⁴⁶ Reference to collective agreements also includes arbitration awards.

⁴⁷ See Cremers, *In search of cheap labour in Europe: Working and living conditions of posted workers*, op. cit., in particular the Country Report on Sweden, 146.

to cater to all elements of the posted worker scenario, however, these elements cannot be evenly balanced in practice when the provisions of the Directive do not reflect the reality; the Directive does not intend to harmonise the labour law rules of 28 Member States but it also has not shown a flexibility or awareness of the differing labour law systems in practice. The application of collective agreements is one of the fundamental issues of the Directive, it was picked up on by the Council in 1992 and has shown itself to be a live issue ever since.⁴⁸

Following the strong opposition to the “*erga omnes* effect”, it was sensibly omitted in the amended Proposal and redefined by Article 3(4) of the amended Proposal which provided that collective agreements are applicable if they are “observed by all undertakings in the geographical area and in the profession or industry concerned”. Or in the absence thereof, those which have been declared “generally applicable... provided that their application... ensures equality of treatment.” Article 4(3) of the amended Proposal added that generally applicable collective agreements need to be published as such in the implementing legislation, if they have not been published, the foreign undertaking will not be bound by the collective agreement.

The final Directive applied the same provisions but with two alterations: firstly, it specified that collective agreements which are “observed by all undertakings in the geographical area and in the profession or industry concerned” need to have been declared “universally applicable”. The clarification of the collective agreements being universally applicable is arguably akin to *erga omnes* and therefore reinstates the terminology that was intended to have been deleted. Thus, it is submitted that “*erga omnes*” was deleted in nomenclature as opposed to in substance, after all, the Latin phrase translates to “towards all”⁴⁹ and “universally” defines, “every instance; without any exception”.⁵⁰ In 2003 the Commission must have forgotten the controversy surrounding the *erga omnes* terminology in this preliminary stage as in its Communication it defined universally applicable agreements as being “*erga omnes* collective agreements.”⁵¹

⁴⁸ *Laval; Rüffert*, op. cit.

⁴⁹ Martin (Editor), *Oxford Dictionary of Law* (Fifth Edition, 2003) OUP, 179.

⁵⁰ Onions (Editor), *The Shorter Oxford English Dictionary On Historical Principles: Volume II: N-Z* (1968) OUP, 2305.

⁵¹ Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, ‘The implementation of Directive 96/71/EC in the Member States’ COM(2003) 458 final, Section 4.1.2.1.

Consequently, there is clearly an overlap between the two definitions, revealing that the *erga omnes* effect has been maintained through the phrase “universally applicable”.

Secondly, Article 4(3) of the amended Proposal that required generally applicable collective agreements to be declared as applying in the implementing legislation was not included in the final text of the adopted Directive. This provision would have made collective agreements even harder to apply in practice, therefore, the second alteration to the final version of the Directive is that where there is no system to declare collective agreements universally applicable they can still apply in two instances under Article 3(8) Directive. Those two instances include collective agreements that are generally applicable to similar undertakings in the geographical area and in the industry concerned, or those which have been concluded by the most representative employers and labour organisations at national level. The fact that the Directive removed the obligation to explicitly declare these collective agreements as applying in the implementing legislation implicates that they should now be easier to extend to posted workers. Unfortunately, the case law based on the final version of the Directive has proved otherwise.⁵²

III. Adoption of the Posted Workers Directive

After five years since its first Proposal, a common position was finally reached⁵³ between the Parliament and the Council. Despite the fact that the UK Government voted against the Directive’s adoption⁵⁴ and the Portuguese Government abstained, this did not prevent its adoption as the Council only needed a qualified majority vote, in accordance with the legal basis, and the Directive was finally adopted by the Council on 16 December 1996. The Member States then had exactly three years to transpose the Directive into their national law.

⁵² *Laval*, op. cit.

⁵³ Decision on the common position established by the Council with a view to the adoption of a European Parliament and Council Directive on the posting of workers carried out in the framework of the provision of services (C4-0327/96-00/0346(COD)) (Codecision procedure: second reading) of 28 October 1996, OJ C320/73.

⁵⁴ “The UK administration believes the Directive is “bureaucratic” and, more importantly, that it hampers freedom to provide services within the single market and makes it more difficult for companies to maintain competitiveness and create jobs.” ‘European Communities: progress at September council’, op. cit., 14.

The table below documents the three stages of the Directive's life until its adoption:

The Proposal (1991)	Amended Proposal (1993)	The Directive (1996)
Article 1: Scope	Article 1: Scope	Article 1: Scope
Article 2: Scope	Article 2: Scope	Article 2: Definition
Article 3: Terms and Conditions of Employment	Article 3: Terms and Conditions of Employment	Article 3: Terms and Conditions of Employment
Article 4: Implementation by 31 December 1992	Article 4: Cooperation on Information	Article 4: Cooperation on Information
Article 5: This Directive is Addressed to the Member States	Article 5: Measures	Article 5: Measures
	Article 6: Implementation Two Years after its Adoption	Article 6: Jurisdiction
	Article 7: Commission Review	Article 7: Implementation by 16 December 1999
	Article 8: This Directive is Addressed to the Member States	Article 8: Commission Review
		Article 9: This Directive is addressed to the Member States

Article 3(1) is described as the “centerpiece of the Directive”.⁵⁵ It sets out the mandatory terms and conditions of employment to be extended to posted workers in the following list:

⁵⁵ Davies, ‘The posted workers Directive and the EC Treaty’, op. cit., 298.

- (a) maximum work periods and minimum rest periods;
- (b) minimum paid annual holidays;
- (c) the minimum rates of pay (defined by the national law and/or practice of the host State), including overtime rates;
- (d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;
- (e) health, safety and hygiene at work;
- (f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;
- (g) equality of treatment between men and women and other provisions on non-discrimination.

The terms and conditions are laid down by law, regulation or administrative provision and/or by collective agreements or arbitration awards which have been declared universally applicable. As aforementioned, in the absence of a system for declaring universal applicability there are two additional options to extend terms and conditions of employment in collective agreements under Article 3(8) Directive. The extension of collective agreements to posted workers under Article 3(1) Directive only applies to activities in the construction sector. This could reasonably be interpreted to mean that the application of collective agreements in other sectors may only be applied via the public policy provisions of Article 3(10) Directive, as it states that the Directive shall not preclude to posted workers, “terms and conditions of employment laid down in the collective agreements or arbitration awards... concerning activities other than those referred to in the Annex [construction sector].” However, it is only in the 2003 Commission Communication that specifies collective agreements outside of the construction sector must also be universally applicable in order to apply to posted workers.⁵⁶ As this condition is not expressly or clearly specified in the Directive, it demonstrates that the Directive is open to misinterpretation in respect of the applicable terms and conditions of employment and these unclear provisions have

⁵⁶ Commission Communication, COM(2003) 458 final, op. cit., Section 3.1.

been left to the Court to determine in practice which does not satisfy the requirement of legal certainty.

One of the Directive's objectives is to guarantee respect for the rights of workers,⁵⁷ which is supported by Article 3(7) Directive; if a term or condition of employment is more favourable to the workers than those stipulated, the more favourable term will apply. For example, if the contractual rate of pay is higher than the host State's minimum wage, the posted workers will receive the contractual rate of pay. Or at least, that is how it was initially interpreted by the Member States, yet the case law, as detailed in Chapter 2, reveals that the application of Article 3(7) in practice is extremely limited, bringing into question just how seriously the Court is willing to uphold the objective of protecting workers.

Article 3(10) Directive enlarges the competence of the host State, subject to the requirement of equal treatment and in compliance with the Treaty, by permitting host States to extend the list of terms and conditions applicable to posted workers beyond those specified in Article 3(1), if they are within the category of public policy provisions and/or terms laid down in collective agreements outside of the construction industry. The availability of public policy provisions, beyond the scope of the mandatory hardcore terms can be likened to the imperative requirements that may be applied outside of the Treaty derogations and it is this possibility of derogation that reflects the reality and flexibility of applying one legislation to all of the Member States; there will always be something so central to the practice and tradition of a particular Member State that will not be known in advance but the possibility to consider these 'grey areas' if and when they arise is a fundamental principle to the workings of the law in practice.

There are two final elements that were introduced by the Directive: (i) social security; and (ii) jurisdiction, that are integral to the Directive's development and therefore require discussion here.

(i) Social Security

⁵⁷ Directive, op. cit., para. 5 Preamble.

The temporary nature of posted workers can prove problematic in some areas of administration, particularly in the context of social security contributions.⁵⁸ To avoid legal uncertainty, workers moving within the EU are subject to the social security rules of only one Member State and this is generally the place where they are economically active at the time, irrespective of their place of residence – the *lex loci laboris* principle – in the interests of equal treatment and non-discrimination. However, this would be the host State’s rules in respect of posted workers, which contradicts the notion that posted workers fall within the provision of services. Therefore, the Court determined⁵⁹ that there is a derogation from the *lex loci laboris* principle for posted workers as they continue to be beholden to and the beneficiary of their home State’s social security scheme even during the period of posting. The Court’s reasoning was based on Regulation 1408/71⁶⁰ which lays down the provisions applicable to social security benefits and contributions and states in its Article 14(1)(a)(i) that special rules apply to posted workers derogating from the general *lex loci laboris* principle. Therefore, paragraph 21 of the Preamble to the Directive introduces a reference to Regulation 1408/71.

(ii) Jurisdiction

Article 6 Directive explicitly deals with jurisdiction and is the only totally new provision since the amended Proposal. It states that legal enforcement will take place in the host State. Therefore, posted workers must be guaranteed easy access to the courts and tribunals of the host State, including arbitration or mediation, on the same footing as national workers. For example, workers posted to the UK could bring a claim before the Employment Tribunal. Proceedings may be brought in another Member State, in compliance with existing international conventions on jurisdiction.

⁵⁸ The relationship between the Directive and social security is an issue in and of itself, the detail of which is beyond the scope of this thesis. Thus, see generally, White, ‘The new European social security Regulations in context’ (2010) JSSL, 17(3): 144-163.

⁵⁹ Case 35/70 *SARL Manpower v Caisse primaire d’assurance maladie de Strasbourg* [1970] ECR 1251.

⁶⁰ Regulation (EEC) No. 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, [1971] OJ L149/2 (now replaced by Regulation (EC) No. 883/2004, [2004] OJ L166/1).

Article 5(1) Brussels Convention⁶¹ confers jurisdiction over contracts of employment primarily upon the courts of the place “where the employee habitually carries out his work”, in effect, the home State. Article 6 Directive adds to the Brussels Convention by allowing posted workers to bring proceedings in the courts of the host State, even though employment in the host State is only temporary. However, this can be viewed as a blatant ambiguity regarding jurisdiction. Kidner⁶² dispelled this apparent ambiguity by referencing Article 7(1) Rome Convention⁶³ which permits the home State’s courts, when applying their own law, nevertheless to give effect to the mandatory rules of another country “with which the situation has a close connection... and... those rules must be applied whatever the law applicable to the contract.” This, after all, reflects the scope of the Directive: that the home State’s rules, under the freedom to provide services, will apply in general to posted workers, even during the posting, but the mandatory terms and conditions of employment of the host State must be adhered to and applied, as laid down by Article 3(1) Directive.

IV. Interim Conclusion

The Directive is a novel piece of Union legislation that goes further than any previous transnational law on the conflict of law rules in this context, “The Convention of Rome does not lay down conditions for the application of collective agreements containing mandatory provisions. The proposal for a Directive does.”⁶⁴ However, this novelty does not come without controversy, from the perspective of service providers, the effect of requiring them to comply with host State rules actually contradicts the character and supposed freedom of what it is to provide services, “the Directive forces [service providers] to comply with two different sets of labour law... which is why some critics have argued that this Directive did not, in fact, *facilitate* the free movement of services (as its legal

⁶¹ Regulation (EC) No. 44/2001 of the Council of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2001] OJ L12/1.

⁶² Kidner, ‘Jurisdiction in European Contracts of Employment’ (1998) ILJ, 27(2): 103-120, 116.

⁶³ Convention 80/934/EEC opened for signature in Rome on 19 June 1980 on the law applicable to contractual obligations, [1980] OJ L266/1.

⁶⁴ Commission Proposal for Directive, 12.

basis requires), but hinders it.”⁶⁵ Therefore, it could be argued that the Directive goes too far by interfering and artificially regulating the employment relationship, “Recent legislation on working time and the national minimum wage has partially undermined the idea of the supremacy of the individual’s freedom to contract, and the Directive continues this trend.”⁶⁶

However, it is submitted that the requirement of imposing the host State’s rules on to the service provider is necessary in order to fulfil all facets of its objectives, “This Directive is a key instrument, both to ensure the freedom to provide services and to prevent social dumping.”⁶⁷ Also, the option on extending the host State’s laws to temporary labour was already judge-made law⁶⁸ before it was formally defined by this Directive. Furthermore, the effect of imposing the host State’s minimum rate of pay to posted workers during the period of posting guarantees that those workers cannot be paid less than the minimum, which was not only a concern prior to the Directive but was actually presented as a commercial advantage of posting workers abroad. *Seco* concerned social security contributions and the Court followed the usual jurisprudence in this area by specifying that *Seco* did not have to pay the employer’s half towards social security contributions in the host State as they were already liable to pay similar contributions in the home State for the posted workers and further, the contributions paid in the host State would not entitle the posted workers to any of the social security benefits in that State. There is nothing too surprising about that ruling, but what is of upmost interest here is the second of the two referred questions, in which the cour de cassation of the Grand Duchy of Luxembourg asked whether the requirement of the service provider to pay the employer’s share of contributions may be off-set by the economic advantages of not complying with the legislation on minimum wages in the host State.⁶⁹ The Court did not agree with this argument but what is interesting is that the question referred by the Luxembourg court could not form a legitimate referred question anymore as

⁶⁵ De Witte, ‘Non-market values in internal market legislation’ in Nic Shuibhne (Editor), *Regulating the Internal Market* (2006) Edward Elgar, 82.

⁶⁶ Kennett and Nesbitt, ‘The consequences of employing a mobile workforce – a patchwork of protections’, op. cit., 399.

⁶⁷ EUROPA Press Release ‘Commission promotes jobs in services sector: posting of workers – less bureaucratic and quicker’ 4 April 2006: http://europa.eu/rapid/press-release_IP-06-423_en.htm [accessed 19 September 2013].

⁶⁸ *Seco*, [14]; *Rush Portuguesa*, [18] op. cit.

⁶⁹ *Seco*, op. cit., [6(2)].

Article 3(1)(c) Directive has confirmed that posted workers cannot be paid less than the host State's national minimum wage. Therefore revealing one of the benefits of this legislation; prior to the Directive the opportunity to pay posted workers less than the minimum wage in the host State was argued as a legitimate economic advantage, whereas now, thanks to the Directive, it would be seen as a blatant disregard of basic workers' rights, a serious threat to the labour system of the host State and an abuse of the internal market. As the Directive has regulated the minimum threshold of pay for posted workers, those previous problems are now, technically, obsolete.

Posted workers represent a unique category of worker and accordingly their governance must be unique. There are clearly competing interests and conflicting policy choices at stake but it appears that the overwhelming dilemma from the Directive's history and creation is that – twenty years on – the Directive has never pin-pointed exactly what it is. Both the Council and the Parliament urged the Commission from the first Proposal to state more clearly what the Directive's aims are and how it can achieve those aims in practice; without clear definitions, incorrect interpretations may be reached. The thesis now turns to the case law thereby revealing which of the forewarnings detailed in this Part have come to light in practice.

Part 2: The Court's Initial Interpretation

I. The Directive's Objectives: Guidance for the Court

Part 1 detailed the lead up to the adoption of the Directive, including the relevant case law that helped shape its creation. In the interests of continuity and coherence, Part 2 begins with the case law immediately following the Directive's adoption so that each section of this thesis builds on from the last and adds something new; ensuring that each issue is dealt with in context, independently and exhaustively. It is submitted that the issues are best illustrated through the case law where the Directive has been used in practice. The cases are presented in chronological order in order to illustrate the Court's changing interpretation of the Directive.

The intentions of the Directive are commendable and it is submitted that its aims follow the same constitutional principles of improving both the economic well-being and social standards of its citizens.⁷⁰ However, the practical realisation of the Directive's objectives concurrently is problematic. This is because the objectives stem from differing policy choices: protecting workers' rights;⁷¹ ensuring fair competition;⁷² and securing the fundamental freedom to provide services.⁷³ Accordingly, this will not guarantee complete harmony in the Court's decisions, "the Court seems to accept that economic and non-market objectives that are simultaneously present in a piece of internal market law do not necessarily have to be consistent with one another and that there may be an internal tension between those objectives that requires a balanced interpretation."⁷⁴ This internal tension can be seen in the Court's interpretation of the Directive which comprises competing interests and also, as seen in Part 1, a lack of clarity in the text regarding the priority of its objectives.

This uncertainty in the legislation is inevitably reflected in the Court with inconsistent judgments; not knowing which objective should be granted greater weight, particularly when the objectives at stake stem from differing policy interests and, further, where there is a lack of Union competence in respect of pay, the right of association, the right to strike or the right to impose lock-outs,⁷⁵ the protection of those rights becomes somewhat ancillary to the principal aim of upholding the fundamental economic freedom. However, it is suggested that these ancillary aims will always be present in internal market legislation in achieving other public policy objectives, "Internal market legislation is always *also* 'about something else', and that something else may, in fact, be the main reason why the internal market measure was adopted."⁷⁶ As aforementioned, *Rush Portuguesa* was the impetus for the creation of the Directive. The case intended to placate the concerns of the French Government regarding an influx of Portuguese workers

⁷⁰ Article 3(3), The Lisbon Treaty, Consolidated Version of the Treaty on European Union of 30 March 2010, OJ C83/13, "The Union shall establish an internal market... based on balanced economic growth... a highly competitive social market economy, aiming at full employment and social progress".

⁷¹ Directive, Preamble [5].

⁷² Directive, Preamble [5].

⁷³ The Directive's legal basis: Articles 53(1) and 62 TFEU.

⁷⁴ De Witte, 'Non-market values in internal market legislation', op. cit., 73.

⁷⁵ Article 153(5), The Lisbon Treaty, Consolidated Version of the Treaty on the Functioning of the European Union of 30 March 2010, OJ C83/47.

⁷⁶ De Witte, 'Non-market values in internal market legislation', op. cit., 76.

and thereby signalled the general atmosphere of the old Member States fearing social dumping and the associated threat of greater competition from the new Member States, as highlighted by an enlarging Union. Accordingly, the creation of the Directive was not just about ensuring the freedom to provide services in the context of posted workers, but it also intended to respect the rights of workers and a climate of fair competition. Clearly, these elements are intended to be complementary of each other, however, their policy objectives do not necessarily equate in equal measure in the Court-room, as will be seen below.

II. The First Case Law Following the Directive's Adoption

(i) Has the Directive Made a Difference?

It is important to note that the Directive was adopted on 16 December 1996 and it came into force three years later; the deadline for transposition was set at 16 December 1999.⁷⁷ Therefore, in cases such as *Arblade and Leloup*,⁷⁸ the Directive had not been adopted at the time of the facts in the main proceedings, thus there was no obligation to take the Directive into account. Nevertheless, in the case it was considered whether the judgment “should be interpreted in the light of Directive 96/71/EC... inasmuch as that directive gives concrete expression to, and codifies, the current state of Community law relating to mandatory rules for the provision of minimum protection.”⁷⁹ However, as the deadline for transposition had not yet expired, this proposal was not adopted, as corroborated by Advocate General (AG) Ruiz-Jarabo Colomer, “no direct reliance can be placed on the interpretation of [the Directive’s] provisions”.⁸⁰ In spite of this, the judgment in *Arblade and Leloup* makes express reference to the Directive in paragraphs 61 and 79 and it therefore was used for guidance. Arguably however, the same conclusions would have been reached in *Arblade and Leloup* without the Directive’s guidance.

⁷⁷ Directive, op. cit., Article 7.

⁷⁸ Joined Cases C-369/96 and C-376/96 *Jean-Claude Arblade and Arblade & Fils SARL and Bernard Leloup, Serge Leloup and Sofrage SARL* [1999] ECR I-8453.

⁷⁹ Ibid., [28].

⁸⁰ AG Opinion *Arblade and Leloup*, [24].

The judgment stipulated five rules in respect of posted workers: (i) the minimum rate of pay applicable to posted workers is that of the host State (it was stated in *Rush Portuguesa*, prior to the Directive, that Union law does not preclude Member States from extending their own legislation or collective labour agreements to posted workers); (ii) the host State cannot impose an obligation on the home State to make payments towards social security contributions where the service provider is already subject to comparable obligations in the home State (the same conclusion was reached in *Seco*⁸¹ and *Guiot*,⁸² which both preceded the Directive, in accordance with the mutual recognition principle); (iii) the host State cannot request the service provider to draw up social or labour documents where the protection of the posted workers is already provided for by documents already kept by the service provider (this follows the mutual recognition principle and avoidance of a double burden – a classic internal market principle); (iv) the host State can request that the service provider keep social and labour documents available throughout the period of posting in the host State in order to effectively monitor compliance with the host State’s legislation, justified by safeguarding the social protection of workers (as previously stated, compliance with the host State’s laws was also determined in *Rush Portuguesa* prior to the Directive); and finally (v) the host State cannot impose an obligation on the service provider to retain, for a period of 5 years following the completion of the period of posting, social documents such as a staff register and individual accounts (no reference to such an obligation is provided for in the Directive and therefore the legislation has not provided any guidance on this point). Therefore, despite the Court having to make its judgment in *Arblade and Leloup* without the Directive, it is suggested that the same conclusions would have been drawn with or without it in any case; implicating that at this stage, the Directive appeared to add very little in practice.

(ii) Going Further: Contradicting the Provisions of the Directive?

The Court’s reluctance to rely on the Directive for guidance was seen again four months later in *Mazzoleni*.⁸³ However, in this case the Court went even further

⁸¹ *Seco*, op. cit.

⁸² Case C-272/94 *Michel Guiot and Climatec SA* [1996] ECR I-1905.

⁸³ Case C-165/98 *André Mazzoleni and Inter Surveillance Assistance SARL* [2001] ECR I-2189.

and contradicted the provisions of the Directive by stating that the minimum rate of pay of the host State does not have to apply to posted workers, providing that, “there may be circumstances in which the application of such rules would be neither *necessary* nor *proportionate* to the objective pursued, namely the protection of the workers concerned [emphasis added].”⁸⁴ In the case, security officers were posted from France to Belgium and they were paid less than the rate stipulated by the collective agreement which was intended to apply to all private security undertakings carrying out any activity in Belgium. It is clear that in accordance with Article 3(1)(c) Directive the minimum rate of pay is to comply with that of the host State. However, the Court made a distinction here and determined that in the circumstances of this case whereby the posted workers are established in a frontier region and due to the nature of their work, as security officers, the staff needed to be rotated in order to avoid customers identifying them too easily. Also, they carried out their work on a part-time basis and for brief periods and part of their work was undertaken in the territory of one or even several Member States, in such circumstances therefore it is for the competent authority of the host State to establish whether imposing the minimum wage of the host State on the service provider would be necessary and proportionate in order to ensure the protection of the workers concerned. The Court was not necessarily contradicting the provisions of the Directive per se, perhaps the nature of the work was too ‘temporary’ to come within the scope of the Directive, or another interpretation is that the Court revealed the early stages of a tendency to unduly favour the freedom to provide services, “The fact that, in the name of proportionality, the Court is ready to set aside the sacrosanct principle of the host State’s regulations securing the protection (and equal treatment) of workers, is indicative of the weight the Court is putting on home State control as a means for the liberalization of services within the EU.”⁸⁵

The Court substantiated its ruling by arguing that the application of the host State’s rules on minimum wages to service providers may not only result in an additional and disproportionate administrative burden, but also the reality of paying certain employees from the service provider differing wages could

⁸⁴ Ibid., [30].

⁸⁵ Hatzopoulos and Do Thien, ‘The Case Law of the ECJ Concerning the Free Provision of Services: 2000-2005’ (2006) CML Rev, 43: 923-991, 982.

potentially “result in tension between employees and even threaten the cohesion of the collective labour agreements that are applicable in the Member State of establishment.”⁸⁶ However, this argument fails to appreciate both sides of service provision; so that when posted workers are paid differing wages in the host State (the minimum wage) compared to the national host State workers (the going rate) that could equally result in tensions in the host State due to a lack of regard for the cohesion of the collective labour agreements of the host State, “I do not think that Directive 96/71 is of great use in terms of comparing the work conditions of posted and national workers; neither does it avoid the ‘social dumping’ of businesses which use the former to achieve work contracts and services in countries of superior labour standards.”⁸⁷

(iii) Protecting the Domestic Labour Market

The case of *Portugaia*⁸⁸ similarly revealed a reluctance on the part of the Court to rely on the Directive, however the case documents an extremely interesting discussion of what constitutes a justifiable restriction of the freedom to provide services, which is of paramount importance in finding a suitable equilibrium to the issues presented by the Directive.

In *Portugaia* a Portuguese undertaking posted its workers from Portugal to carry out construction work in Germany. Portugaia was paying its workers a wage lower than the minimum wage payable under the collective agreement that was deemed generally applicable in the construction sector in Germany. The legislation at issue provided the following, “under German law governing collective agreements, the social partners may conclude collective agreements at various levels, at the federal level as well as at the level of an undertaking. In this regard, collective agreements specific to an undertaking in principle take precedence over general collective agreements.”⁸⁹ Therefore, the German employers had the opportunity to conclude more specific collective agreements with a German trade union in order to avoid the application of the general

⁸⁶ *Mazzoleni*, op. cit., [36].

⁸⁷ Ojeda-Aviles, ‘European Collective Bargaining and Posted Workers: Comments on Directive 96/71/EC’ (1997) *Int J Comp LLIR*, 13(2): 127-130, 128.

⁸⁸ Case C-164/99 *Portugaia Construções Lda* [2002] ECR I-787.

⁸⁹ *Ibid.*, [9].

collective agreement; an opportunity that was not available to employers from other Member States. It was considered whether this was an infringement of Article 56 TFEU, but in its defense of the national law, “It points out that, according to the stated grounds of the AEntG [Arbeitnehmer-Entsendegesetz (Law on the Posting of Employees)], its objective is to protect the national labour market – in particular against social dumping resulting from an influx of low-wage labour -, to reduce national unemployment and to enable German undertakings to adapt to the internal market.”⁹⁰ This is a public interest objective that reveals the reality of the internal market – and an issue that is so pertinent to the case of posted workers – social dumping. If the domestic employers were able to protect their prerogatives by negotiating their own specific agreements with the trade unions it would ease the transition and adaptation to a rapidly enlarging market, confirm that the national labour market has maintained its significance and extinguish the threat of social dumping. However, equally, it could disguise national protectionism and is ultimately “liable to prohibit, impede or render less attractive the activities of a provider of services”⁹¹ thereby restricting trade and not supporting the objectives of the European Union that the Member State has agreed to uphold.

Imperative requirements that have been accepted by the Court to justifiably restrict the freedom to provide services include the protection of workers.⁹² However, this is still subject to the proportionality test.⁹³ Thus, the protection of workers is not an absolute right and it must be balanced against the fundamental freedoms, “This clearly opens up a gap in the *protection of workers*, since it has to be weighted against the *economic freedom of their employers*.”⁹⁴ Therefore, arguably it is an even more onerous task to protect the “domestic construction industry and to reduce unemployment in order to avoid social tensions”,⁹⁵ although a valid and prolific concern, it is *prima facie* discriminatory and could too easily, if used incorrectly, be utilised to meet protectionist ends.

⁹⁰ Ibid., [12].

⁹¹ Ibid., [16].

⁹² Ibid., [20]; *Webb*, op. cit., [19]; *Arblade and Leloup*, op. cit., [36]; *Mazzoleni*, op. cit., [27]; Case C-279/00 *Commission v Italy* [2002] ECR I-1425, [19].

⁹³ Case C-49/98 *Finalarte Sociedade de Construção Civil Lda v Urlaub* [2001] ECR I-7831, [50].

⁹⁴ Hatzopoulos, and Do Thien, ‘The Case Law of the ECJ Concerning the Free Provision of Services: 2000-2005’, op. cit., 976.

⁹⁵ *Portugaia*, op. cit., [25].

Moreover, it has been established by the case law⁹⁶ that economic grounds, such as considerations linked to the employment market, cannot be relied upon to justify a restriction of the freedom to provide services. Further, as it would be a distinctly applicable measure only the Treaty derogations would be available for potential justification and the Court would most likely take a very stringent approach to proportionality in terms of this public policy requirement. When a public policy requirement is held as being “the very negation of the fundamental freedom to provide services, to be accepted, it must be shown that it constitutes a condition indispensable for attaining the objective pursued.”⁹⁷

The Court determined in *Portugaia* that the intention of the legislature is “not conclusive”;⁹⁸ that is not to say that the aim of the national law does not exist in the broader context of the Union, but rather that it must be balanced with the other interests at stake, in effect, the freedom to provide services. As the proportionality test is not ‘black and white’ but must be malleable in practice in order to fulfil its purpose effectively, the overriding reasons relating to the public interest could potentially always be disproportionate, even if justified. In this case, the Court dismissed the objective of protecting the domestic construction industry and thereby reducing unemployment to avoid social tensions as an economic aim. It is submitted that the objective could come within the heading of “public policy” under the Treaty derogations, if argued carefully. Public policy is clearly the most suitable Treaty derogation available in the context of the freedom to provide services, ahead of public security and public health, and further, any possible justification that can be drafted in this area must come under the Treaty derogations so that it is always available for a potential justification, whether the measure is distinctly or indistinctly applicable. The argument would have to be constructed selectively, focussing on the impact of the rhetoric to the Member State’s advantage, for example, it could be argued that the intention of the German national law allowing domestic employers to negotiate specific collective agreements with trade unions was not discriminatory as it did not prohibit other non-German undertakings that are established in Germany from concluding such collective agreements. However, clearly it cannot be argued by any stretch of the

⁹⁶ *Finalarte*, op. cit., [39]; *Portugaia*, op. cit., [26].

⁹⁷ C-279/00 *Commission v Italy*, op. cit. [18].

⁹⁸ *Portugaia*, op. cit., [27].

imagination that there is not a restriction on the freedom to provide services here; only undertakings established in Germany can conclude such collective agreements, but equally, just as the intention of the legislature is “not conclusive”, neither is Article 56 TFEU – it is open to exceptions.

In presenting a potential justification, it is necessary to steer clear from arguing the protection of the domestic market and its level of employment as that is too obviously compatible with protectionism, even though it is the disruption to the host State’s labour market that evidently needs protecting. It follows that the potential justification of enabling the German undertakings to adapt to the internal market also does not hold weight; this is not to take away from the fact that German undertakings, just like all undertakings in the internal market, require time to settle into the new dynamic and adjust to the changing environment of the internal market, however, that justification, by its very nature, will only ever be temporary as the market develops and all undertakings are required to adapt. These issues are representative of the Directive’s dominant concern; the legislation provides for temporary, cheap labour, yet its legal basis directs its prominent objective to be in line with the economic freedoms. Therefore, this sets a very difficult standard in presenting a justified and proportionate public interest objective.

It is imperative to successfully argue a strong justification on the grounds of Article 52 TFEU, in conjunction with Article 62 TFEU, under public policy in order to bolster the social values that are connected to national interests. This thesis aims to provide a successful argument in this context and at present, the most viable justification is likely to be on the basis of avoiding social tensions that are caused by the market. It would be wrong for the Court to argue that social tensions fall under an “economic aim” and it could be argued that the predicament presented by posted workers introduces a very real perturbation of the social order,⁹⁹ but the Commission has submitted in the case law that the “concept of public policy must be interpreted restrictively... and... recourse to that concept presupposes the existence... of a genuine and sufficiently serious threat affecting

⁹⁹ The perturbation of the social order is most acutely seen at times of recession and, unfortunately for all those involved, the *Laval* Triplet coincided precisely with the very beginning of the Global Recession in December 2007 thereby magnifying the negative impact of those decisions.

one of the fundamental interests of society.”¹⁰⁰ It is submitted that the provision of labour – particularly when it is temporary – presents a markedly sensitive issue from the labour and social point of view and therefore the issues that arise from the Directive do present a sufficiently serious threat to the public interest. Therefore, aside from specifically providing solutions to the Directive, a sub-aim of this thesis is to provide an intellectual, valid and robust justification to protecting national interests in this context.

In *Portugaia* the Court stated that the declared intention of the legislature cannot be conclusive and it did not accept protection of the domestic market as a justification, however, it did accept the protection of workers as a legitimate justification and left the proportionality test to the national court. Therefore, it would appear that the Court was much more deferential to the national rules where there is a ‘human’ element involved and by leaving proportionality to the national court, the Court revealed that there is not an automatic dismissal of such restrictions to trade.

(iv) Interim Conclusion

As can be seen from the initial case law on posted workers, following the Directive’s adoption, the Court showed a reserve to utilise and voice the Directive’s full effect. However, as aforementioned, this is most likely accountable to the fact that the events in the main proceedings took place prior to the expiry of the deadline for transposition. Nevertheless, *Arblade and Leloup* demonstrated that the Court’s judgment would not have differed if the Directive had been invoked, and further, in *Mazzoleni* the category of workers was not deemed to come within the scope of the Directive. Finally, in *Portugaia* the Court held that protecting the domestic labour market is not a valid justification for restricting the provision of services. From an economic perspective, the accession of new Member States from Eastern Europe opens up new markets for the goods and services already being offered in the old Member States and allows the potential for public contracts to be performed more cheaply by lower paid workers

¹⁰⁰ Case C-279/00 *Commission v Italy*, op. cit., [13].

from Eastern Europe.¹⁰¹ Yet, from a social perspective, the effect this will have on the national workers of the host State is potentially damaging and is a reoccurring issue in the case law on posted workers; from *Rush Portuguesa* prior to the Directive, to *Portugaia* following its adoption, it does not appear that the Directive has satisfactorily eased the concerns of the old Member States in respect of their labour markets.

Article 8 Directive states that the Commission shall “review the operation of this Directive with a view to proposing the necessary amendments to the Council”. In 2003, following the initial case law after the Directive’s adoption, the Commission presented its first Communication on the implementation of the Directive.¹⁰² The Communication highlighted the current problems raised by the case law and suggested solutions, the Commission identified Article 4 Directive ‘Cooperation on information’ as being the lynchpin to effective implementation of the Directive, this includes making the information on the terms and conditions of employment under Article 3 Directive generally available. As far as revision of the Directive was concerned, the Commission concluded that, “it is not necessary to amend the Directive. The difficulties encountered in implementing it have so far tended to be more of a practical nature than a legal nature.”¹⁰³

III. The Early Case Law Invoking the Directive

In this section, it is argued that the Court’s interpretation of the Directive at this stage evenly balanced the three elements of the posted worker scenario: promoting service provision; maintaining fair competition by upholding the legislation of the host State; and guaranteeing the protection of workers.

The first case in this line of case law that expressly relied on the Directive is *Wolff & Müller*.¹⁰⁴ The national court that made the reference for a preliminary ruling did not refer to the Directive but, as the facts in the case took place following the transposition deadline of the Directive, the Austrian Government and the Commission in their written observations expressed that, “the facts in the

¹⁰¹ Ewing and Hendy (Editors), *The New Spectre Haunting Europe – The ECJ, Trade Union Rights, and the British Government* (2009) IER, 20.

¹⁰² Commission Communication COM(2003) 458 final, op. cit.

¹⁰³ Ibid., Section 5.

¹⁰⁴ Case C-60/03 *Wolff & Müller GmbH & Co. KG v José Filipe Pereira Félix* [2004] ECR I-9553.

main proceedings... *must* be regarded as coming within the scope of Directive 96/71 [emphasis added].”¹⁰⁵ Mr Pereira Félix was posted from Portugal to Germany where he was employed on a building site for Wolff & Müller. He sought payment jointly and severally from his employer and from Wolff & Müller for unpaid remuneration, claiming that Wolff & Müller, as guarantor, was liable for sums in respect of wages not received by him. Wolff & Müller opposed those claims on the grounds that Paragraph 1(a) AEntG (German Law on the Posting of Workers which provides that the service recipient is liable as guarantor) constituted an unlawful infringement of the constitutional right to carry on an occupation under Article 12 Grundgesetz (Basic Law) and Article 56 TFEU.

Article 5 Directive provides that Member States are to ensure compliance with the Directive and shall take measures in the event of failure. Therefore, it is the responsibility of the Member States to ensure that the obligations provided for in the Directive can successfully be enforced by the workers. It has been argued that liability as guarantor does provide greater protection for workers as it presents another party from whom posted workers can claim their wages.¹⁰⁶ However, the referring court had doubts as to the genuine benefit to posted workers of liability as guarantor,¹⁰⁷ for the reason that in practice it has its limitations as the posted workers may not be familiar with the language or legal position in the host State, therefore, enforcement may prove more arduous for the posted workers which highlights the importance of the Member States upholding their obligations under the Directive in order to protect those workers, including Article 3(1)(c) Directive which ensures that posted workers receive the minimum rate of pay, “In fact, if entitlement to minimum rates of pay constitutes a feature of worker protection, procedural arrangements ensuring observance of that right, such as the liability of the guarantor in the main proceedings, must likewise be regarded as being such as to ensure that protection.”¹⁰⁸ Therefore, the Court held that Article 5 Directive, interpreted in the light of Article 56 TFEU, administers that when a national system subcontracts the conduct of building work to another undertaking, the building contractor becomes liable to pay the minimum wage to a worker or to pay contributions to a joint scheme for parties to a collective agreement.

¹⁰⁵ Ibid., [25].

¹⁰⁶ Ibid., [16].

¹⁰⁷ Ibid., [17].

¹⁰⁸ Ibid., [37].

The case observes all three elements of the posted worker scenario by (i) promoting service provision (if the option is available in the Member State, liability as guarantor presents another party, aside from the service provider, from whom posted workers can claim their wages); (ii) maintaining fair competition by upholding the legislation of the host State (the host State's minimum rate of pay is a 'hardcore' mandatory rule of the Directive); and (iii) guaranteeing the protection of workers (the minimum rate of pay guaranteed to posted workers constitutes a feature of worker protection, thus, procedural arrangements must ensure the observance of that right).

(i) Joint and Several Liability

Wolff & Müller is significant for permitting a State to impose joint and several liability. Yet, it was a permission rather than an endorsement at this stage, as joint and several liability is not provided for in the original Directive; its implication can be found in Article 5 Directive in accordance with the measures for its enforcement and was thus provided *de facto* in *Wolff & Müller*. However, in the proposed Enforcement Directive¹⁰⁹ it has been expressly provided, for the first time.

Article 12 Enforcement Directive, entitled "Subcontracting – Joint and several liability", provides that the main contractor (service recipient) can be held liable, in addition to or in place of the employer (service provider), for any outstanding net remuneration corresponding to the minimum rates of pay and/or contributions due to common funds and also for any back-payments or refund of taxes or social security contributions unduly withheld from the worker's salary. Despite the intention of this Article providing greater protection for posted workers, it is arguably one of the most controversial provisions of the Enforcement Directive, in part, because joint and several liability does not exist in every Member State¹¹⁰ and therefore there may be additional administrative costs

¹⁰⁹ Proposed Enforcement Directive COM(2012) 131 final, op. cit., Article 12.

¹¹⁰ In fact, only eight Member States (Italy, the Netherlands, Belgium, Finland, France, Spain, Austria and Germany) and Norway have established joint and/or several liability in their own national legislation. For a detailed review of the national laws on joint and several liability see: Eurofound, 'Liability in subcontracting processes in the European construction sector' by Houwerzijl and Peters: <http://www.eurofound.europa.eu/publications/htmlfiles/ef0894.htm> [accessed 14 November 2012].

in implementing these measures, which could have the effect of restricting the freedom to provide services.

The objectives of implementing liability as guarantor were highlighted by the referring court in *Wolff & Müller*, “the explanatory memorandum to the legislation states that the objective of liability as guarantor is to make it more difficult to award contracts to subcontractors from so-called cheap-wage countries so as thereby to revive the German labour market in the construction sector, protect the economic existence of small and medium-sized establishments in Germany and combat unemployment in Germany.”¹¹¹ The concern of protecting the domestic market in respect of posted workers has established itself in the case law as a valid and persistent issue. The possibility of imposing liability on the service recipient will have the effect of making subcontracting to lesser-known undertakings, from other Member States, less attractive as the service recipient will have an additional responsibility to the posted workers and the Court recognised that the service recipient is “generally more solvent”¹¹² than the service provider. Thus, the idea is to retain subcontracting within Germany so that the national workers and entities will be the primary beneficiaries. It is interesting that the objective of the national law was stated as combating unemployment in Germany and thereby protecting the German labour market and the Court did not preclude this measure in light of the Directive and Article 56 TFEU. The protection of workers, both national and posted, was clearly prioritised in this case by advocating the implementation of liability as guarantor.

The Austrian Government pointed out in its observations, “there is not necessarily any contradiction between the objective of upholding fair competition on the one hand and ensuring worker protection, on the other. The fifth recital in the preamble to Directive 96/71 demonstrates that those two objectives can be pursued concomitantly.”¹¹³ This observation was satisfactorily demonstrated by the Court in *Wolff & Müller*. As aforementioned in *Portugaia*, the protection of workers is a well-established public interest objective but the protection of the domestic labour market is not. In *Wolff & Müller*, the Court did not state that the protection of the domestic labour market is now recognised as a valid justification

¹¹¹ *Wolff & Müller*, op. cit., [18].

¹¹² *Ibid.*, [40].

¹¹³ *Ibid.*, [42].

for restricting the provision of services, but if liability as guarantor robustly protects workers (as the Directive aims to do), and an ancillary objective of liability as guarantor is to protect the domestic market, the Court will seemingly be more lenient to the spill-over effect of the national measure and accordingly, the sought-after balance of the competing interests in this predicament becomes more attainable.

(ii) Infringement Actions

The following two infringement actions demonstrate the Court continuing its balanced approach in upholding all the objectives of the Directive. *Commission v Germany*¹¹⁴ concerned the calculation of the minimum rate of pay; the German legislation did not recognise all allowances and supplements as being integral components of the minimum wage. Therefore, the service provider would most likely have to pay their posted workers a higher wage than the national workers in Germany. The result of which can be concluded in two ways: either, it is another example of national protectionism of the German labour market; or, it is in compliance with the German method in an area that is not subject to harmonisation, to the extent that the Directive requires the host State to determine and have absolute autonomy over what constitutes the minimum wage, as per the second subparagraph of Article 3(1) Directive, “the concept of minimum rates of pay... is defined by the national law and/or practice of the Member State to whose territory the worker is posted.”

The Court held that in failing to recognise the constituent elements of the minimum wage, Germany failed to fulfil its obligations under Article 3 Directive. It would be too hasty a conclusion to claim that the Court dismissed the autonomy of the host State in determining the minimum wage. As the Directive does not take account of social security or taxation, it is the gross amount of wages that must be taken into account in order to provide a more transparent comparison of wages between the Member States. Therefore, as provided for by the Directive, the host State can extend their own rules as defined by their laws, however, it does not follow that when comparing the minimum rate of the host State and the wages

¹¹⁴ Case C-341/02 *Commission v Germany* [2005] ECR I-2733.

paid by the service provider the host State can impose their own payment structure.

Commission v Germany does not negate the fact that host States are granted a “pretty free hand”¹¹⁵ to extend their labour laws to posted workers on their territory. However, the application of Article 3(1) Directive transcends any deviation from the mandatory terms and conditions of employment to be applied to all posted workers. In this case, it is submitted that the Court evenly balanced the objectives of (i) promoting service provision (cannot implement a method that has the effect of obliging the service provider to pay unjustifiably higher wages); (ii) maintaining fair competition by upholding the legislation of the host State (the case reiterated that the minimum rate of pay must be in accordance with the host State’s law and/or practice); and (iii) the protection of workers (the host State cannot impose their own payment structure as it is necessary to ensure transparency in respect of the minimum wage).

*Commission v Austria*¹¹⁶ concerned third country nationals as posted workers. The Austrian legislation at issue required all third country posted workers to obtain an ‘EU Posting Confirmation’. Issuing the confirmation required: (i) the workers concerned to have been employed for at least one year by the posting undertaking or to have concluded an employment contract of indefinite duration; and (ii) evidence that the Austrian national employment and wage conditions were complied with.

The Austrian Government conceded that the national legislation at issue restricted the freedom to provide services, but that it was justified in order to, *inter alia*, “prevent the national labour market from being disrupted by a flood of workers who are nationals of non-Member States.”¹¹⁷ The Austrian Government stated that the restriction was also justified by overriding requirements relating to the general interest, such as the protection of workers and the safeguarding of public policy and public security; arguably ‘safer’ and more well-established justifications. However, the ‘EU Posting Confirmation’ was held to be an authorisation procedure and not merely a declaratory procedure, therefore, the application process could take up to six weeks, which constitutes a

¹¹⁵ Davies, ‘The posted workers Directive and the EC Treaty’, op. cit., 306.

¹¹⁶ Case C-168/04 *Commission v Austria* [2006] ECR I-9041.

¹¹⁷ *Ibid.*, [54].

disproportionate restriction and cannot be justified by protecting the workers concerned as such a requirement would make the recruitment of workers from non-Member States much more arduous for the service provider and therefore would hinder their recruitment as a result.

The very nature of services is that they are intended to be sporadic and in accordance with the mutual recognition principle, if the third country workers are lawfully employed in the home State, the host State cannot impose further obligations. The case of *Vander Elst*¹¹⁸ placed the *locus* of regulation on the home State in this respect; it was held that if the service provider ‘lawfully and habitually’ employs third country nationals, the service recipient may not impose additional obligations therein. In *Commission v Austria* the Court suggested that a more proportionate measure to monitor compliance with the host State’s social welfare and wages legislation would be to require the service provider, prior to the posting, to report the workers to be posted, the duration of the posting and the service that is being provided by that posting.

The ground for automatic refusal laid down in the Austrian national law was held as being disproportionate in respect of public policy and public security, since posted workers do not seek to access the labour market of the host State as, by the very definition of a posting, they return to their country of origin or residence on completion of their work in the host State. As aforementioned, it is submitted that the Court’s argument of the posted workers not seeking access to the labour market is unsatisfactory and unconvincing; it implies that the national labour market is not disrupted during the posting and that clearly does not reflect the reality – the work is temporary but it still takes place. The reoccurring theme in much of this case law is the protection of national labour markets from being disrupted by a flood of workers, who are either third country workers or nationals from other Member States, therefore for the Court to rigidly maintain that there is no disruption to the labour market as the posted workers will leave at some point ignores the fact that when the workers are present in the host State that causes some disruption to the labour market; albeit not a permanent disruption, but a disruption nonetheless.

¹¹⁸ *Vander Elst*, op. cit.

The infringement actions did not support the protection of workers as emphatically as in *Wolff & Müller*, but it is important to remember that the protection of workers is not the only objective and the early case law invoking the Directive does reflect a consideration of all of the legislation's objectives. In *Commission v Austria* the Court balanced the objectives of (i) promoting service provision (cannot impose unjustified and disproportionate additional requirements on the service provider); (ii) maintaining fair competition by upholding the legislation of the host State (the Court suggested a more proportionate method to monitor compliance with the Austrian employment and wage conditions); and (iii) the protection of workers (the 'EU Posting Confirmation' would have the effect of hindering recruitment of employees from non-Member States and therefore could not be justified).

IV. A Conceptual Shift in the Court's Interpretation of the Directive

The final case on posted workers that the Court determined prior to the *Laval* Quartet¹¹⁹ was *Commission v Germany*.¹²⁰ This case was determined on 18 July 2007; five months to the day before *Laval* was decided. *Commission v Germany* exemplifies the very first shift in the Court's approach; and if there was to be a "Laval Quintet", it is submitted that *Commission v Germany* would be the fifth case. As we have seen, from this 'timeline' of the case law on posted workers, the early case law showed the Court's reluctance in using and implementing the Directive and then as the Court's familiarity with the Directive improved so did its judgments and there was clearly an evenly balanced weighting granted to the three determinative elements of the posted worker scenario. At this stage, the Court ensured that all of the Directive's objectives were given fair consideration so that the Directive itself was interpreted as intended and applied uniformly across the Member States. However, the significance of *Commission v Germany* is that it revealed the Court changing tack, and this was not a temporary change; it was the forerunner of the *Laval* Quartet in which the Court firmly placed the economic freedoms above any other considerations.

¹¹⁹ *Viking*; *Laval*; *Rüffert*; C-319/06 *Commission v Luxembourg*, op. cit.

¹²⁰ Case C-490/04 *Commission v Germany* [2007] ECR I-6095.

In *Commission v Germany* the Commission claimed that in light of three separate issues, Germany failed to fulfil its obligations under Article 56 TFEU. The Commission's first issue was the obligation on the service provider to contribute to the German paid-leave fund. However, the Commission was unsuccessful on this point as it did not provide the necessary evidence to establish that foreign undertakings actually were obliged to contribute to the fund. The second complaint of the Commission was the obligation on the service provider to translate into German all of the documents required under national law that are to be kept at the building site in the host State during the period of posting. It was held that the Commission was unsuccessful again in proving this point to be inconsistent with Article 56 TFEU. The obligation to retain specific documents in German at the building site is justified as Article 4 Directive on the 'Cooperation on information' does not render this a superfluous obligation. Also, the four documents stipulated (the employment contract, pay slips, time sheets and proof of payment of wages) were relatively short and therefore did not impose a heavy financial or administrative burden for the undertaking posting their workers and therefore, this requirement did not go beyond what was necessary to achieve the objective of the social protection of workers and the monitoring of that protection. Understandably, if the documents were not translated into German the task of on-site supervision would become more arduous in practice for the German civil servants. The requirement to translate documents into the host State's language reveals two things: firstly, translating the four documents was deemed proportionate in this context and secondly, on a broader scale, it emphasises that posted workers are a unique category of worker; whereas in other cases of service provision the rules would be in line with the home State and accordingly the country of 'production/origin' as opposed to 'sale/provision', however, in this case the fundamental principle of mutual recognition was outweighed by the obligation to monitor compliance with the host State's rules under Article 4 Directive in line with worker protection, revealing that the applicable law to posted workers is a true combination of both home and host State rules.

The first two points of complaint from the Commission in this case reveal the Court's readiness to rule in favour of the host State and worker protection. However, it is the third complaint from the Commission in which the Court appears to unreasonably and controversially favour the freedom to provide

services. The third complaint concerns the obligation on foreign temporary employment agencies to declare the place of posting and to declare if there is any change relating to that place of posting (Paragraph 3(2) AEntG). The German Government claimed that the obligation is proportionate and justified in the interests of more effective monitoring and consequently improved worker protection. The temporary employment agencies established in other Member States were required, in accordance with the German legislation, to make a declaration in writing to the undertaking in Germany detailing in German the surname, first name and date of birth of the posted workers, the start and finish dates of the placement and the place of work to which the workers will be posted. However, undertakings established in Germany were not required to do the same; accordingly, it was a discriminatory restriction that could only be justified by the Treaty derogations. The Court's reasoning, which is relatively short in comparison to the first two complaints, stated that, "the German Government has not pleaded anything that could be covered by one of those reasons [public policy, public security or public health]."¹²¹ Therefore, the Court held that the obligation to make such a declaration imposed by the German legislation is an unjustified restriction on the freedom to provide services and in the interests of this fundamental freedom, it is prohibited. However, it is submitted that the Court's reasoning on this third and final point is problematic. This is because, in accordance with the 2006 Communication from the Commission,¹²² which provides express clarification of certain technical elements of the Directive, the Commission stipulated that Member States are permitted to use declarations to the effect provided for under Paragraph 3(2) AEntG:

"the Commission considers that the host Member State, in order to be able to monitor compliance with the conditions of employment laid down in the Directive, should be able to demand, in accordance with the principle of proportionality, that the service provider submit a declaration, by the time the work starts, at the latest, which contains information on the workers who

¹²¹ Ibid., [87].

¹²² Commission Communication, 'Guidance on the posting of workers in the framework of the provision of services' COM(2006) 159 final.

have been posted, the type of service they will provide, where, and how long the work will take.”¹²³

The Communication from the Commission on this point also declared that, “Almost half the Member States require service providers which post workers to their territory to submit a prior declaration to their authorities.”¹²⁴ In fact, the 2007 Communication from the Commission found there to be sixteen Member States that require a prior declaration from the service provider and one Member State (Czech Republic) imposes such an obligation on the service recipient.¹²⁵ The requirement is intended to assist with monitoring compliance of the host State rules and thereby supporting the enforcement of the full protection guaranteed to workers, as intended by the Directive. The Commission also recognised that the use of such a declaration is “just as effective as and less restrictive than a prior authorisation”¹²⁶ and therefore meets the test of proportionality. Clearly, a prior authorisation or formal system of registration of the posted workers would be unduly cumbersome on the service provider, however, the system of implementing a declaration appears to support a more transparent and open method of monitoring the number of posted workers in the host State at any one time in order to ensure that those posted workers return to their home State on completion of the work and accordingly do not circumvent the free provision of services and enter the host State’s labour market on a permanent basis.

The ambiguity of the Commission advocating such a declaration in 2006 and at the same time bringing an infringement action against Germany for implementing such a declaration and consequently so easily contradicting its own guidance, is not settled by the case which makes no reference to the Commission’s Communication. The reasoning provided by the Court was that the supplementary obligation imposed by use of the declaration for the purposes of monitoring posted workers in the host State is not imposed upon the employment agencies established in the host State, the result of its use would therefore make

¹²³ Ibid., Section 2.1.(c).

¹²⁴ Ibid., Section 2.1.(c). The twelve Member States that require such a prior declaration are: Austria, Belgium, Germany, Spain, France, Greece, Luxembourg, Hungary, Latvia, Malta, Netherlands and Portugal.

¹²⁵ Commission Communication, ‘Posting of workers in the framework of the provision of services: maximising its benefits and potential while guaranteeing the protection of workers’ COM(2007) 304 final, Section 3.1.

¹²⁶ Commission Communication COM(2006) 159 final, op. cit., Section 2.1.(c).

the transnational provision of services more cumbersome than the internal provision of services. The Commission's Communication was issued prior to this decision at a time when the Court had not delivered any judgments relating to such a request from the national law. A potential caveat is that *Commission v Germany* refers to "foreign temporary employment agencies" whereas the Commission's Communication refers to the "service provider" submitting a declaration. Clearly these two types of undertakings differ more than just in semantics, however, the essence and objective of both undertakings is to post workers to a host State in accordance with the Directive and therefore to apply the Directive differently to the undertakings would lead to legal uncertainty and would ultimately be rendered futile. Of course the Commission's Communication is a non-binding measure and therefore the Court does not have to uphold its advice word-for-word but to disregard it without acknowledgment removes any impact that it may have, which is highlighted by the Commission bringing this infringement action in respect of a measure that it opined to support the previous year. This contradiction reveals a flaw in the Commission's understanding of the Directive and accordingly the Court's ambiguous interpretation of its use in practice; highlighting the lack of clarity surrounding the Directive's purpose, leading to the manipulation of its objectives.

AG Ruiz-Jarabo Colomer wrote the Opinion for this case, as he did in several of the other cases in this line of case law.¹²⁷ In his Opinion, AG Ruiz-Jarabo Colomer also did not make reference to the Commission's Communication and accordingly reached the same conclusion as the Court; that the requirement under Paragraph 3(2) AEntG is incompatible with Article 56 TFEU. The reasoning was very similar to that of the Court's; there has been an infringement and as it is a discriminatory measure and it cannot be justified by one of the Treaty derogations, there is no possible justification for such a restriction. Interestingly, AG Ruiz-Jarabo Colomer added that, "the obligation to notify each posting is not in issue but rather the identity of the person responsible for that task."¹²⁸ This reason provided by the AG to prohibit the restriction does appear to be a more plausible and deeply considered reason than those provided for by the

¹²⁷ AG Opinion *Arblade and Leloup*; AG Opinion *Wolff & Müller*; AG Opinion C-341/02 *Commission v Germany*; AG Opinion C-490/04 *Commission v Germany*, op. cit.

¹²⁸ Ibid., AG Opinion C-490/04 *Commission v Germany* [93].

Court as the protection of personal data is recognised by Article 8 Charter. If the Court had relied on this reasoning to prohibit Paragraph 3(2) AEntG it implies that removing the requirement to provide the identity of the worker and simply stating the number of workers that will be posted would be a more proportionate, and therefore potentially justifiable, method of effectively monitoring compliance. However, this alternative form of declaration – of stating the number of posted workers and not their identity – would have presented an additional obligation on the service provider and accordingly was not suggested by either the AG or the Court.

The *Commission v Germany* evokes the “turning point” in the Court’s interpretation of the Directive whereby the first two complaints, particularly the second, avidly support worker protection and the host State as it is not considered a superfluous task when posting workers to Germany to translate specific relevant documents into German. However, the third complaint which favours the freedom to provide services over the national law of the host State is interesting as it is unclear why the host State was unsuccessful on this point; earlier Communication from the Commission expressed that declarations are permitted, but in this case, the Court held that requiring foreign temporary employment agencies to make a declaration in respect of the posted workers was not permitted. The Court’s reasoning as to why the host State was not entirely successful against the Commission’s complaints is unsatisfactory, but what this case does show is a subtle change in the Court’s priorities in the context of posted workers. From initially maintaining the Directive’s objectives “promotion of the transnational provision of services requires a climate of fair competition and measures guaranteeing respect for the rights of workers”¹²⁹ by balancing support of the three elements; the service provider, the host State and workers’ rights, it appears that the latter elements have become less influential. This theory is by no means a passing concern, as the case law that followed; the ‘*Laval Triplet*’, showed an overwhelming push towards fulfilling Article 56 TFEU on the freedom to provide services over any other considerations that may be deemed as restrictions to trade.

The Court’s voice is imperative in shaping the general principles of Union law¹³⁰ and it cannot be underestimated; as exemplified here, *Commission v*

¹²⁹ Directive, op. cit., Preamble, [5].

¹³⁰ Tridimas, *The General Principles of EU Law* (Second Edition, 2006) OUP, 6.

Germany clearly set the tone for the posting cases that followed. In accordance with Article 6(3) Treaty on European Union (TEU), the general principles of Union law are inspired by the fundamental rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the constitutional traditions common to the Member States. Also, international legislation such as the ILO Convention all contribute to the goal of social policy in the Union and therefore all of these elements are intended to create the *sui generis* structure of Union law. Accordingly, when the Court adopts a particularly one-sided approach which has the effect of rendering its social policy objectives void, this does not blend with its role as the Union's constitutional adjudicator.¹³¹ Supporting the freedom to provide services is an integral element to the posted worker scenario and therefore must be maintained, however, when this element is prioritised without good reason, as seen in *Commission v Germany*, this is concerning. It shows that the Court has reached its decision on a tenuous and inadequate basis.

(i) What Caused this Conceptual Shift? Lead up to the Laval Quartet

So on what basis was the Court making its decision? Were there external pressures at play that influenced the judgement and the invisible, yet perceptible, thread that pulled the Court firmly towards Article 56 TFEU? It is hereby submitted that the Court's interpretation of the Directive at this point, from *Commission v Germany*,¹³² shifted from initially maintaining all of the Directive's objectives to gradually narrowing its interpretation exclusively in line with the legal basis. It is argued that the shift reflects an uncertainty in the Directive's text itself leading to, and allowing for, differing interpretations,¹³³ and also, the Court changed its priorities as the Union expanded and therefore its interpretation of the same legislation has naturally evolved and adapted. This thesis will now set the scene in the run up to the *Laval* Quartet (early to mid-2000s) revealing significant changes that took place in the EU causing a systemic re-thinking of the geography and scope of the Union that inevitably echoed throughout all of the Institutions,

¹³¹ Chapter 3 elaborates on the role of the Court.

¹³² C-490/04 *Commission v Germany*, op. cit.

¹³³ As recognised in Part 1, the Directive's lack of clarity has been a constant issue in respect of this legislation.

including the Court.

In 1999 the euro was introduced in eleven Member States by the Economic and Monetary Union (EMU) showing the progression to harness an ever-closer Union, now also bound by a single-currency. In 2000 the Charter was adopted by the Convention which made fundamental rights more visible, therefore, this inferred that the Union became the central locus for issues regarding fundamental rights, whereas previously this was left to the competence of the Member States, which could ultimately raise questions of competence creep, as the Union became able to assert its position over fundamental rights and gain further control over socially and politically sensitive areas that used to be within the sole jurisprudence of the Member States.¹³⁴ The area of EU citizenship also witnessed significant changes in the early to mid-2000s, for example, it was determined that children have an independent right of residence, regardless of the fact that their parents are not Union citizens.¹³⁵ In 2001 the first idea of a Constitutional Treaty was considered in Laeken, Belgium, that would require wide-ranging institutional reform and democratic regeneration. Member States signed the Constitutional Treaty in 2004 that would create a European Union-wide Constitution as well as provisions for an EU flag, anthem, motto and holiday and in essence, a strong push towards a dominant and centralised European identity. This was clearly a step too far for certain Member States and not a natural progression of unity, therefore, following the negative outcome of the French and Dutch referenda, the Treaty was ultimately abandoned. Also in 2004 the Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland, Slovenia, Cyprus, Malta and Slovakia joined the Union. In accordance with the transitional arrangements, for the first two years following accession the national law of the Member States that were already Members determined the new Member States' access to the labour market, so for example, the workers from the new Member States may have still required a work permit. The next period of transition was a

¹³⁴ One of the most controversial Chapters of the Charter, that is of particular relevance to this thesis, is Chapter IV on Solidarity which includes the right of collective bargaining and action including the right to strike, which technically is outside of the Union's competence, accordingly, the Solidarity Chapter has been implemented to varying degrees in the Member States; Protocol (No. 30) on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, OJ C115/1-388.

¹³⁵ Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091; Case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* [2004] ECR I-9925.

further three years in which the old Member States could still impose additional requirements, on the condition that the old Member States gave prior notification of such a restriction to the Commission. In the final two year period (bringing the total time period of transitional arrangements to seven years in 2011) the old Member States could continue to apply restrictions but only if they informed the Commission of serious disturbances in the labour market. Therefore, the initial two year probation period in which the old Member States could freely impose restrictions on the workers from the ten new Member States came to an end prior to the *Laval* Quartet, meaning that there would have been less automatic protection for the labour markets of the old Member States at that time. EU enlargement continued in 2007 when Bulgaria and Romania joined the Union. On 13 December 2007 (two days after the ruling in *Viking* and five days before *Laval*) the Treaty of Lisbon was signed, which made substantive and procedural changes to the constitutional and institutional framework of the EU, its external relations and EU policies.¹³⁶

These developments have changed the shape and policies of the Union and it is submitted that this must have also influenced the policy decisions of the EU Institutions, including the Court, bringing into question whether the original Directive from 1996 was still viewed as being coherent in the evolving economic and social climate of the Union.

Further to these changes that were taking place in the Union at large, the area of services and posted workers was also changing prior to the *Laval* Quartet. On 4 April 2006 the Commission published three documents: (i) an amended Proposal for a Directive on services in the internal market (the original 2004 Proposal had to be substantially amended and this amended Proposal was finally adopted as the ‘Services Directive 2006/123/EC’);¹³⁷ (ii) the Commission’s guidance on the use of the Posted Workers Directive (which was dismissed in *Commission v Germany*,¹³⁸ as previously discussed in detail);¹³⁹ and as an accompaniment to the Commission’s Communication (iii) a staff working

¹³⁶ Biondi, Eeckhout and Ripley (Editors), *EU Law After Lisbon* (2012) OUP.

¹³⁷ Amended Proposal, ‘for a Directive of the European Parliament and of the Council on services in the internal market’ COM(2006) 160 final.

¹³⁸ C-490/04 *Commission v Germany*, op. cit.

¹³⁹ Commission Communication COM(2006) 159 final, op. cit.

document on the implementation of the Posted Workers Directive.¹⁴⁰ It is submitted that the amended Proposal of the Directive on services in the internal market being published by the Commission on the same day as the further guidance on the Posted Workers Directive is telling of the direction that the Commission intended the Directive to take.

Following these documents, the Commission published two more on the Posted Workers Directive prior to the *Laval* Quartet. A further Communication¹⁴¹ and a staff working document¹⁴² on 13 June 2007 in light of information provided by the Member States and the EU social partners in response to questionnaires from the Commission submitted in October 2006, intended to gain a deeper insight into the Member States' experience of the Directive to date, and the Commission's Communication also took account of the European Parliament's Resolution of 26 October 2006 on the application of the Directive. The Communication from the Commission is entitled, "Posting of workers in the framework of the provision of services: maximising its benefits and potential while *guaranteeing the protection of workers* [emphasis added]". Whereas, the 2006 Communication from the Commission does not include the protection of workers in the title, "Guidance on the posting of workers in the framework of the provision of services". The explicit reference to protection of workers in the 2007 Communication reveals the necessity to draw attention to all of the Directive's objectives at this time.

The results of the Commission's questionnaire from the Member States and the EU social partners are detailed in the staff working document and highlight the extent of the varying degrees to which the Directive has been implemented. In some respects this is positive as it has allowed the Member States to maintain their diversity and therefore organise their social models and labour law systems and collective bargaining arrangements in a manner that suits the

¹⁴⁰ Commission Staff Working Document, 'Commission's services report on the implementation of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services' SEC(2006) 439 final.

¹⁴¹ Commission Communication, 'Posting of workers in the framework of the provision of services: maximising its benefits and potential while guaranteeing the protection of workers' COM(2007) 304 final.

¹⁴² Commission Staff Working Document, 'Posting of workers in the framework of the provision of services: achieving the full benefits and potential on the examination of the situation in the Member States with regard to the aspects covered by the COM(2006) 159 "Guidance on the posting of workers in the framework of the provision of services"' SEC(2007) 747 final.

national method, whilst fulfilling their obligations under the Treaty. However, the associated advantages with the implementation of directives in general, in leaving the choice of form and method of transposition to the national authorities, also indicates that where there is no general and uniform application or direct applicability, as is the case with regulations, this could lead to legal uncertainty and a lack of proper implementation of the Directive. As an example of this, the UK did not adopt an entirely new Act to implement the Directive but extended and elaborated pre-existing texts to cover the provisions of the Directive,¹⁴³ however, this may lead to confusion over where to look for the appropriate legislation, given that the applicable UK legislation can be found on a page of the Department for Trade and Industry's website,¹⁴⁴ but all of the relevant information is not on this page as it refers the reader to other pages of the website and other legislation that is relevant to the Directive. The varied application in the Member States of the Directive gives the Court a greater opportunity to rule that the national measures are unjustified in accordance with Article 56 TFEU, "The proper functioning of administrative cooperation among Member States is an essential instrument for compliance control; its virtual absence may explain why Member States revert to control measures, which appear unnecessary and/or disproportionate in the light of the interpretation by the ECJ of Article [56 TFEU]."¹⁴⁵

Therefore, it would appear at this stage that despite the Commission's efforts to provide greater clarity of the Directive (with two Commission Communications and accompanying staff working documents on the same legislation in the space of fourteen months), the Member States' differing implementation (as seen by the results from the questionnaire in the 2007 staff working document) and the events in the EU at large that took place between 1999 – 2007, followed by the start of the Global Recession in December 2007, all culminated to produce change and uncertainty. This was the atmosphere prior to, what is arguably, one of the most infamous groups of cases experienced in the EU legal order: the *Laval* Quartet.

¹⁴³ Commission Communication COM(2003) 458 final, op. cit., Section 3.1.

¹⁴⁴ UK Government 'Department of Trade and Industry: Posting of Workers Directive': <http://webarchive.nationalarchives.gov.uk/+/http://www.dti.gov.uk/er/directive.htm> [accessed 10 September 2012].

¹⁴⁵ Commission Communication COM(2007) 304 final, op. cit., Section 4.

Chapter 2: The Issues Relating to the Directive

I. Introduction

Chapter 1 concluded by detailing the first step in the Court's changing interpretation of the Directive. Chapter 2 confirms that this changing interpretation became an axiomatic shift in the *Laval Triplet*¹⁴⁶ which reduced every judgment to the Directive's legal basis in upholding the freedom to provide services.

This Chapter centres on the *Laval Triplet* in which the issues relating to the Directive reached their summit. Each case is sub-categorised into the predominant issues that it illustrates. The objective of this Chapter is to decipher the extent and severity of the relevant issues so that the need for a solution and the most appropriate means of achieving that solution will become clear. Further, this Chapter aims to verify whether the issues presented are intrinsic to the Directive itself, or whether they can be attributed to external factors, such as the Court's interpretation, the results will therefore provide a definite indicator as to which direction Chapter 3 must take.

II. *Laval Quartet*

The *Laval Quartet* consists of *Viking*¹⁴⁷ and the *Laval Triplet*. Each case will be discussed below, including facts and analysis, however, only a brief description of *Viking* has been provided as the case is not based on the interpretation of Article 56 TFEU or the Directive and therefore does not substantially contribute to the arguments of this thesis. However, I have decided to mention the case as the issues that it presents are so closely linked to the *Laval Triplet* that these four cases have become synonymous with each other and further, *Viking* and *Laval* are very often coupled together in the literature.¹⁴⁸ Therefore, in order to fully

¹⁴⁶ *Laval*; Rüffert; C-319/06 *Commission v Luxembourg*, op. cit.

¹⁴⁷ *Viking*, op. cit.

¹⁴⁸ *Inter alia*: Barnard, 'Viking and Laval: a Single Market perspective' in Ewing and Hendy, *The New Spectre Haunting Europe – The ECJ, Trade Union Rights, and the British Government*, op. cit.; Davies, 'One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ', op. cit.; Hinarejos, 'Laval and Viking: the right to collective action versus EU fundamental freedoms', op. cit.

appreciate the significance of the following line of case law a brief description and analysis of *Viking* has been included.

Viking was decided on 11 December 2007 in the Grand Chamber with Judge Schintgen as the Rapporteur and Maduro as the AG. The facts of the case are as follows: Viking, a ferry operator established under Finnish law and its passenger ferry (the *Rosella*), ran the route between Helsinki, Finland and Tallinn, Estonia. The *Rosella* was running at a loss as it was in direct competition with the Estonian ferries which operated at lower wage costs. Consequently, Viking sought to reflag the *Rosella* to Estonia. The crew of the *Rosella* were members of the Finnish Seamen's Union (FSU) (affiliated to the International Transport Workers' Federation (ITF)) and they opposed Viking's plans of reflagging, in the interest of protecting Finnish jobs and gave notice of intended strike action and the ITF sent a circular to its affiliates asking them to refrain from entering into negotiations with Viking. In response, Viking brought an action before the High Court of Justice of England and Wales (EWHC) in order to restrain the planned strike action requesting the court to declare that the action was contrary to Article 49 TFEU. The court granted the order sought by Viking, which the ITF and FSU appealed on the grounds that the right of trade unions to take collective action to preserve jobs is a fundamental right recognised by Title X TFEU on Social Policy, particularly Article 151 TFEU which gives expression to the European Social Charter and the Community Charter of the Fundamental Social Rights of Workers which provide that trade unions have the right to take collective action against an employer established in a Member State to seek to persuade him not to move part or all of his undertaking to another Member State.¹⁴⁹ The Court of Appeal of England and Wales decided to stay proceedings and refer ten questions to the Court for a preliminary ruling.

AG Maduro opined that, "Sometimes, when the questions are complicated, the answers are simple." And then swiftly followed this satisfying statement with the following, "This is not one of those occasions."¹⁵⁰ When asked whether collective action by a trade union or association of trade unions is a directly discriminatory restriction of Article 49 TFEU or Regulation 4055/86 and if so, whether it can be justified by the fact that collective action is a fundamental right

¹⁴⁹ *Viking*, op. cit., [25].

¹⁵⁰ AG Opinion *Viking*, op. cit., [1].

as protected by Union law and/or the protection of workers, AG Maduro stated, “The right to associate and the right to collective action are essential instruments for workers to express their voice and to make governments and employers live up to their part of the social contract.”¹⁵¹ Also, it must be borne in mind that the right to take collective action is protected by various international instruments that the Member States have ratified, such as the European Social Charter, given express reference in Article 151 TFEU which protects “proper social protection, dialogue between management and labour...[and] measures which take account of the diverse forms of national practices”, and ILO Convention No. 87 on the Freedom of Association and the Protection of the Right to Organise. Further, the Court also makes reference to the Community Charter of the Fundamental Social Rights of Workers (also given expression in Article 151 TFEU) and the Charter which expressly supports the right of collective bargaining and action under Article 28. The international instruments aforementioned and the constitutional traditions common to the Member States all contribute to the fundamental rights of the EU, forming an integral part of the general principles of Union law and the Court must ensure the observance of those rights.

The Court never denied the importance of both economic *and* social protection in *Viking*, therefore, to conclude that economic values automatically took precedence over the social interests at stake in this case would be a trivialisation of the facts and an incomplete analysis of the issues. The Court explicitly supported the importance of the social provisions, the real issue, however, is how genuine that support really was, “it may be asked whether the ECJ is engaging with – as opposed to just citing – any of this material.”¹⁵² The Court slightly ‘ducked-out’ of fully supporting the social interests by leaving the proportionality test in this case to the national court. However, despite leaving it in the hands of the national court, it is submitted that the Court left the national court in no doubt as to how the case should be concluded, stating that even if it is ultimately for the national court, as they have sole jurisdiction to interpret the national legislation, the Court “may provide guidance... in order to enable the

¹⁵¹ Ibid., [60].

¹⁵² Davies, ‘One Step Forward, Two Steps Back? The *Viking* and *Laval* Cases in the ECJ’, op. cit., 139.

national court to give judgment”.¹⁵³ The Court provided that even if the collective action could be justified by the objective of protecting workers, it could only stand if the jobs at risk were jeopardised or under serious threat and, if that is established, the collective action cannot go beyond what is necessary to attain that objective. Therefore, the Court advised the national court to determine whether the FSU had no other means at their disposal which were less restrictive and whether they had exhausted those means prior to initiating collective action. In effect, the guidance offered by the Court provided a very narrow interpretation of the restriction of the freedom of establishment.

In its ruling, the Court determined three points: firstly, the collective action at issue comes within the scope of Article 49 TFEU, therefore those rights are capable of restricting the fundamental freedoms and must be justified and proportionate. The second point in the ruling reveals another major development initiated by the case; Article 49 TFEU confers rights on private undertakings which may be invoked against a trade union or an association of trade unions. The horizontal direct effect of this Article being applied in private law entails that, “The concept of private barrier has been widened – the question is, of course, to what extent.”¹⁵⁴ The third point is that the collective action at issue, which encouraged ‘Viking Line’ established in Finland to enter into a collective work agreement with a trade union in that State and to apply those terms to the employees of the subsidiary ‘Viking Line Eesti’ established in Estonia, does constitute a restriction of Article 49 TFEU. In principle, such a restriction can be justified by an overriding reason of public interest, provided that it is proportionate.

Ultimately, the trade union was asking Viking to pay the employees of its Estonian subsidiary in accordance with Finnish wages; it is submitted that if this was upheld it would defeat the very purpose of the internal market that both Finland and Estonia have agreed to promote when acceding to the Union. Therefore, in this respect, the judgment seems to be correct. However, the difficulty lies in the fact that an area that was intended to be left to the competence of the Member States and consequently outside the scope of the fundamental

¹⁵³ *Viking*, op. cit., [85].

¹⁵⁴ Hinarejos, ‘Laval and Viking: the right to collective action versus EU fundamental freedoms’, op. cit., 722.

freedoms has now been swept-up within their remit and therefore subjected to the judicial scrutiny of justifications and proportionality. And finally, not only has the national labour law been drawn under the microscope of the internal market, but it has been subjugated by the fundamental freedoms.

III. *Laval* Triplet

As aforementioned, *Viking* focuses on the freedom of establishment and is not concerned with posted workers, but it does set the scene for the *Laval* Triplet, which consists of *Laval*, *Rüffert* and *Commission v Luxembourg*. These three cases elicit the most fundamental issues in respect of posted workers, to which the attention of this Chapter now turns. The cases are dealt with chronologically, starting with *Laval*; initially the facts are presented, followed by an in-depth and thorough analysis of the issues.

IV. *Laval*

One week after *Viking*, the Court determined *Laval* on 18 December 2007 in the Grand Chamber with Judge Løhmus as the Rapporteur and Mengozzi as the AG. The reference from the Arbetsdomstolen (Swedish Labour Court) was on the interpretation of Articles 18 (non-discrimination on grounds of nationality) and 56 (freedom to provide services) TFEU and the Directive.

Laval, a company established in Latvia, posted around 35 workers to refurbish Söderfjärd School in Vaxholm, Sweden. The site was operated by L & P Baltic Bygg AB (Baltic), an undertaking established in Sweden. Sweden does not have a national minimum rate of pay and therefore relies on trade unions to reach an agreement with their employer, “the coverage of collective agreements in the Swedish private sector is very extensive.”¹⁵⁵ *Laval* had signed a collective agreement with the Latvian building sector’s trade union, of which around 65% of the Latvian workers concerned were members, but at this stage it had not signed anything with Byggnads (Swedish building and public works trade union), Byggettan (a local branch of Byggnads) or Elektrikerna (Swedish electricians’

¹⁵⁵ AG Opinion *Laval*, op. cit., [24].

trade union). Byggettan required that Laval sign the collective agreement for the building sector and guarantee that the workers on site receive an hourly wage of SEK 145 (approximately €16). If Laval signed the tie-in to the collective agreement it would have been able to negotiate the €16 wage and if an amount was not agreed upon there was a fall-back clause of €12. The agreement contained additional conditions such as Laval having to pay contributions for insurance premiums, surcharges to various Swedish bodies and a commission to Byggnads for the monitoring of wages by local branches of that union. Further, Byggettan threatened collective action if Laval did not agree to these requirements, however, the hourly wage proposed did not constitute a minimum wage and was not laid down in accordance with Article 3(1) Directive. Therefore, Laval did not sign the collective agreement and consequently collective action was undertaken by Byggettan and Byggnads, consisting of blockading the Vaxholm site, which involved preventing the delivery of goods onto the site, placing pickets and prohibiting Latvian workers and vehicles from entering the site. It is submitted that the collective action in the case was not a protest against the freedom to provide services, but it highlighted the trade unions' discontent regarding the disparity of wages and the collective action intended to put a stop to unequal conditions. Laval asked the police to intervene, but the police could not do anything as this collective action was regarded as lawful under Swedish national law. One month later, the collective action intensified as Elektrikerna initiated sympathy action, consisting of boycotting all of Laval's sites in Sweden. Finally, the workers posted by Laval went back to Latvia and did not return. The town of Vaxholm requested that the contract with Baltic be terminated, and the following month, Baltic was declared bankrupt.

Laval brought an action before the Swedish Labour Court against Byggnads, Byggettan and Elektrikerna seeking a declaration and two orders: (i) a declaration that the collective action and sympathy action is illegal; (ii) an order that the action must stop; and (iii) an order that the trade unions must pay compensation for the damage caused. The Swedish Labour Court dismissed Laval's application for an interim order that the action must stop and instead, decided to stay proceedings and refer two questions to the Court for a preliminary ruling.

The first question asked whether Articles 18 and 56 TFEU and the Directive preclude trade unions from attempting, by means of collective action, to force a service provider to sign a collective agreement in the host State (Sweden), specifically, where the collective agreement at issue has not been declared universally applicable.

The second question refers to the Swedish Law on workers' participation in decisions (Medbestämmandelagen, 'the MBL') which "lays down rules applicable to the right of association and of negotiation, collective agreements, mediation of collective labour disputes and the obligation of social peace, and contains provisions restricting the right of trade unions to take collective action."¹⁵⁶ In accordance with Article 41 MBL there is a 'social truce' between workers and employers bound by a collective agreement, therefore, it is prohibited to take collective action to seek to amend or have set aside collective agreements between other parties and Article 42 MBL prohibits the organisation or support of illegal collective action. Following the *Britannia* judgment (1989, No. 120) in which the Swedish Labour Court considered the right of Swedish trade unions to take collective action against a flag of convenience (FOC) vessel whereby the crew were already subject to a valid foreign collective agreement, the Swedish Labour Court held that the prohibitions set out in the MBL do extend to the collective action in this case, provided that such collective action is prohibited by the foreign legislation to the signatories to that collective agreement. In other words, the prohibition on taking collective action can only be activated whereby the MBL directly applies, therefore, the prohibition on collective action is not activated whereby the collective action is aimed at service providers from other Member States posting their workers to Sweden. This became the law and entered into force on 1 July 1991 known as the 'Lex Britannia'. In light of this, the second question from the Swedish Labour Court asked whether Articles 18 and 56 TFEU and the Directive are incompatible with the Lex Britannia.

Initially, Byggnads, Byggettan and Elektrikerna challenged the admissibility of the reference from the Swedish Labour Court for the reason that despite Laval being established in Latvia and Baltic being established in Sweden, as Baltic is in fact a subsidiary of Laval and the share capital of both undertakings

¹⁵⁶ *Laval*, op. cit., [11].

are held by the same people, they should in fact be regarded as one entity. Therefore, “[Laval] is seeking to escape all the obligations under Swedish legislation and rules relating to collective agreements and, by relying on the provisions of the Treaty on services and on Directive 96/71, is making an improper attempt to take advantage of the possibilities offered by Community law.”¹⁵⁷ This is a very serious allegation on the part of the Defendant trade unions; it implies that Laval abused the law as it circumvented the Swedish national conditions of employment to take advantage of the lower Latvian conditions and therefore used their subsidiary as a letter-box company as they wrongfully took advantage of the internal market. Consequently, the Defendant trade unions claimed that this is a domestic issue for the national court to determine. However, AG Mengozzi opined, “there is nothing in the file to prove or even indicate that Laval’s activities were wholly or mainly directed towards Swedish territory with a view to evading the rules that would have been applicable to it if it had been established in Sweden.”¹⁵⁸ Further, the fact that the Latvian workers returned to Latvia corroborates that there is no evidence to support the allegations that Laval intended to enable Latvian workers to gain access to the Swedish employment market. The Court held that the reference for a preliminary ruling is in fact admissible for the reason that the national court sought an interpretation of Union law in the context of a case that concerned Latvian workers being posted to Sweden and the consequence of the collective action in Sweden led to the suspension of the work and the Latvian workers returning to their home State.

In response to the first question the Court examined the collective action in light of potential justifications and the proportionality test which exemplifies the manner in which this fundamental social right was treated when up against an economic freedom, “the very fact that the unions are having to justify their collective action at all shows that the unions are already on the defensive.”¹⁵⁹ It would seem that prior to the Lisbon Treaty, which granted the Charter legally binding status, and therefore placed social rights in the primary law, the legislative balance of economic versus social rights weighed in favour of the former. Therefore, at this time a stricter test of scrutiny was applied to any social

¹⁵⁷ Ibid., [44].

¹⁵⁸ AG Opinion *Laval*, op. cit., [115].

¹⁵⁹ Ewing and Hendy, *The New Spectre Haunting Europe – The ECJ, Trade Union Rights, and the British Government*, op. cit., 32.

protection measure that restricted an economic fundamental freedom and therefore required a proportionate justification from the Defendants. The Swedish Government and the Defendant trade unions submitted that the restrictions at issue were justified as the justification for their actions constituted an overriding reason of public interest in the form of worker protection which, in principle, is capable of justifying a restriction of one of the fundamental freedoms, as evidenced by the case law.¹⁶⁰ The Court accepted that the blockading action in this case, which aimed at ensuring the terms and conditions applicable to the posted workers was fixed at a certain level, does fall within the objective of protecting workers.¹⁶¹ However, it was held that the “specific obligations, linked to signature of the collective agreement for the building sector, which the trade unions seek to impose on undertakings established in other Member States by way of collective action... the obstacle which that collective action forms cannot be justified with regard to such an objective.”¹⁶² The Court therefore held, in response to the first question, that Article 56 TFEU and the Directive preclude the trade union action in this case. Interestingly, the AG reached a different conclusion in his Opinion:

“Where a Member State has no system for declaring collective agreements to be of universal application, Directive 96/71/EC... and Article [56 TFEU] must be interpreted as *not preventing* trade unions from attempting, by means of collective action in the form of a blockade and solidarity action, to compel a service provider of another Member State to subscribe to the rate of pay determined in accordance with a collective agreement which is applicable in practice to domestic undertakings in the same sector that are in a similar situation and was concluded in the first Member State, to whose territory workers of the other Member State are temporarily posted, *provided* that the collective action is motivated by public interest objectives, such as the protection of workers and the fight against social dumping, and is not

¹⁶⁰ *Viking*, op. cit., [77].

¹⁶¹ *Laval*, op. cit., [107].

¹⁶² *Ibid.*, [108].

carried out in a manner that is disproportionate to the attainment of those objectives [emphasis added].”¹⁶³

Unlike the Court, the AG opined that Union law does not preclude the collective action in this case. In respect of these differing conclusions, there are two caveats to that Opinion, the first being that the action is only allowed whereby the Member State has no system for declaring collective agreements to be of universal application, which implies that in Member States that do have such a system the trade union action would be precluded. The second caveat to this Opinion is that the collective action must be motivated by public interest objectives, such as the protection of workers and the fight against social dumping, and is proportionate in attaining those objectives. However, it would appear from the very detailed Opinion that AG Mengozzi did not believe the collective action in this case to be proportionate, “it seems to me that the fact of making the very possibility of applying a given rate of pay conditional upon prior signing up to all the conditions of a collective agreement that apply in practice to undertakings established in Sweden in the same sector and in a similar situation goes beyond what is necessary to ensure the protection of workers and to prevent social dumping.”¹⁶⁴ Further, in the discussion of the additional conditions contained in the collective agreement that go beyond the rate of pay, the AG stated, “It seems to me that some of the payments claimed from Laval... in particular those subsidising the SBUF and vocational training in the building sector, display no connection with the protection of workers or any real advantage significantly contributing to the social protection of posted workers.”¹⁶⁵ It is therefore submitted that despite the AG reaching a different conclusion to the Court in respect of the collective action, the proportionality test that he leaves to the national court would lead them to the same conclusion as the Court: that Article 56 TFEU and the Directive preclude the trade union action in *Laval*.

The second question went one step further and rather than looking at the way the national law had implemented Union law in the context of the collective action it asked directly if the national law, in its own right, is compatible with the

¹⁶³ AG Opinion *Laval*, op. cit., [309].

¹⁶⁴ Ibid., [280].

¹⁶⁵ Ibid., [295].

Union law; placing national versus Union law head-to-head. The Swedish law ‘MBL’ and specifically the ‘Lex Britannia’ grants that “Swedish collective agreements become applicable and take precedence over foreign collective agreements already concluded”.¹⁶⁶ In practice it clearly is a discriminatory measure and one that can only be justified by the Treaty derogations. The very essence of the freedom to provide services implies the prohibition of discriminating against a service provider on account of its nationality; it is self-evident that the service provider will be established in a different Member State to the service recipient therefore discriminating against the provider on account of being based in a Member State other than the host State would clearly create an obstacle to the provision of services. Since discriminatory rules can only be justified on grounds of public policy, public security or public health and it was determined that the discrimination at issue cannot be justified under any of those headings, the Court consequently held that the Lex Britannia which prohibits Swedish trade unions from taking collective action against other Swedish undertakings, but not against service providers from other Member States, is precluded by Articles 56 and 57 TFEU. The effect of the Lex Britannia is that the domestic labour markets would have been protected from industrial action in this context, whereas the service providers from other Member States would not. However, it also reveals, in the same way as in *Viking*, an area of national law that was initially considered to be safe from the scrutiny of the Union legal order was actually held to come within its scope; even if not within its competence, and furthermore, it was subjugated by EU law.

It is submitted that the impact of these rulings was made even greater by their proximity: two very bold statements from the Court made just one week apart. If there was only *Viking* or *Laval* there would have been great and interesting discussions in respect of their content and implied consequences, but as there were two it validates that the Grand Chamber of the Court was happy with its legal reasoning in the first case and so answered the second case much along the same lines, solidifying a very definite attitude and opinion of the Court. The following analysis therefore maintains the focus on *Laval* as that is the most pertinent case in respect of posted workers and therefore is the most useful case to

¹⁶⁶ *Laval*, op. cit., [40(2)].

this thesis, however, at times *Viking* will also be mentioned as some of the issues are so inter-linked that it would be artificial to discuss one in isolation of the other.

The most significant issues stemming from *Laval* can be summarised as follows: (i) collective action comes within the scope of Article 56 TFEU (when previously it was considered that this Article does not apply to collective action, in light of Article 153(5) TFEU); (ii) by ruling that collective agreements that are not universally applicable must have been published in the implementing legislation in accordance with Article 3(8) Directive shows that the Court was *ultra vires*; (iii) Article 56 TFEU confers rights on private undertakings which may be invoked against a trade union or an association of trade unions (confirming that these fundamental freedoms have horizontal direct effect capable of being used against social partners); (iv) the collective action at issue, constitutes a restriction of Article 56 TFEU and the Swedish legislation that permitted the collective action against the service provider was held to be precluded by Articles 56 and 57 TFEU, highlighting the tension between national and Union law; and (v) the judgment was made at the start of the Global Recession and accordingly, subjugating workers' rights in favour of the free movement of cheaper labour from other Member States corroborated the existing concerns in respect of protecting the domestic labour market.

Accordingly, the five specified issues are presented under the following headings below: (A) Competence; (B) Judicial Activism; (C) Horizontal Direct Effect; (D) EU Law versus National Law; and (E) Local Unemployment at Times of Recession.

A. Competence

One of the most contentious issues of *Laval* is the place of social rights within the jurisdiction of EU law. The Defendant trade unions, along with the Swedish and Danish Governments, observed that the right to take collective action does not come within the scope of Article 56 TFEU in accordance with Article 153(5) TFEU. This provision, which specifies the limit to the Union's competence in the field of social policy, became primary law as amended by the Treaty of Nice and following the Lisbon Treaty, where the legislators had the opportunity to amend

the Treaties once more, this provision continued to remain as primary law. However, it is to be noted that, even where the Union does not have competence, these rights must be consistent with Union law; the prohibition on restricting the fundamental freedoms still applies, if there were certain areas in which national law was able to restrict the rights of the internal market the concept of the Union legal order would ultimately be rendered ineffectual. Therefore, the social rights of the workers continue to be the Member States' prerogative but this is strictly within the constant presence of the Union context. AG Mengozzi observed that, "the social laws of the Member States do not enjoy any general exemption from the application of the Treaty rules"¹⁶⁷ this is especially realised where those social rights come within the context of the fundamental freedoms; the collective action in *Laval* is only being undertaken because of the provision of services, therefore to warrant that an effect of the cause falls outside of the fundamental principle of that cause would inadvertently result in the destruction of a principle because of its impact. Clearly, the impact is a negative one; for trade unions to have to resort to collective action indicates something systemically wrong and this has been seen in nearly every case preceding *Laval*; the threat of cheaper labour becoming more accessible across the Union, as supported by the Union's freedom of movement provided for by the Treaty and the Directive. Therefore, the problem is a very real one and the collective action in this context was clearly called for, not only specifically to *Laval*, but in light of the enlarging Union in general. Thus, the threat to jobs and the threat to the national labour system protecting those jobs now facing the judicial scrutiny of the Union was a step too far for the Defendant trade unions and Swedish and Danish Governments who observed that this does not come within the jurisdiction of the Union. It is submitted that there has to be some truth to this observation, after all, it does state in the Treaty that the Union has no place to regulate this area of social law, however, it can be argued that the Union is in no way legislating this area but it is upholding the Treaties via the ever-present concept of negative integration.

This section on the competence of the Union will initially detail the law in this area, as prescribed by the Treaty, followed by an assessment of whether the issues at stake in these cases, primarily the use of collective action and bargaining,

¹⁶⁷ AG Opinion *Laval*, op. cit., [50].

can legitimately come within the competence of the Union legal order and therefore whether they can be limited by that legal order.

(i) The Law on Collective Action and Collective Bargaining

In accordance with Article 4(2)(b) TFEU, social policy is a shared competence of the Union and the Member States. However, it is important to note that this competence is limited to “the aspects defined in this Treaty”.¹⁶⁸ Title X of the TFEU is the social policy chapter and defines the areas of social policy that come within the shared competence of the Union as well as the limits of that competence. Article 153(1) TFEU provides the areas of social policy that are covered by the Union’s competence, “the Union shall support and complement the activities of the Member States in the following fields: ...(c) social security and social protection of workers; ...(f) representation and collective defence of the interests of workers and employers, including co-determination, subject to paragraph 5”. Therefore, the social protection of workers, which is a legitimate justification for the restriction of the fundamental freedoms in the case law, does come within the competence of the Union along with the representation and collective defence of the interests of workers and employers. It is argued that “representation and collective defence” are synonymous with collective action, however, clearly as this is suffixed by it being subject to paragraph 5, the type and extent of collective action is not necessarily within the competence of, and therefore protected by, Union law.

Paragraph 5 of Article 153 TFEU specifies the limitations of Union competence in the area of social policy as the following, “The provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs.” Thus, despite it being a shared competence, it does not cover all aspects of social policy and the four aspects that are excluded from Union competence essentially boil down to provisions on pay, collective action from the employees (right of association and right to strike) and collective action from the employers (imposing lock-outs); arguably, the very substance of the rights at issue in *Laval*. It can therefore be summarised that the representation and

¹⁶⁸ Article 4(2)(b), TFEU.

collective defence of the interests of workers and employers, which arguably includes collective action, is a shared competence of the Union and Member States in principle, however, there are certain forms of collective action that are outside the scope of the Union's competence.

As for collective bargaining, it would appear that it is subject to fewer conditions and can be viewed as falling within the shared competence of the Union and the Member States in its entirety, in accordance with Article 152 TFEU, "The Union recognises and promotes the role of the social partners at its level, taking into account the diversity of national systems. It shall facilitate dialogue between the social partners, respecting their autonomy." The notion that collective action is in principle a shared competence, yet subject to limitations, appears to show a lack of insight into the industrial relations context as collective action and collective bargaining are inextricably linked, "The ECJ's approach in *Laval* can also be criticized for its poor understanding of the industrial relations context... [the judgment] ignores the inherent links between collective bargaining and the ability to take collective action."¹⁶⁹ Collective action can be used to implement collective bargaining from employers and employees alike, to ensure that both sides uphold their part of the bargain. However, it would appear that activities such as strike action; a central theme to the case law, does not come within the competence of the Union. The collective action specifically undertaken in *Laval* included blockading the site, picketing and sympathy action in the form of boycotting Laval's sites in Sweden. These actions are not expressly mentioned in Article 153(5) TFEU, which details the activities that do not come within Union competence in an exhaustive list, therefore, it could be argued that they do come within the Union competence. Alternatively however, it could equally be argued that these activities only arise where there is some form of strike action already taking place, by exercising the right of association which, as aforementioned, is excluded from the Union's competence.

In summary, the law in this area is not clear-cut as there are different forms of collective action and the Treaty does not detail where there is an overlap which form falls within its competence. This is a key issue and determinative factor as this is an area so close to the heart of national law, therefore in

¹⁶⁹ Davies, 'One Step Forward, Two Steps Back? The *Viking* and *Laval* Cases in the ECJ', op. cit., 144.

establishing it within the competence of the Union confirms that the Union has more of a strong-hold on the way this area is to be regulated, which can be an advantage in the sense of added protection, but ultimately leads to more regulation and therefore a lack of sensitivity and appreciation of the peculiarities of the national labour law systems and essentially de-sensitises the unique approach each Member State has previously adopted in regulating this area that suits their own cultural and political climate, “The *Laval* decision in particular has potentially far-reaching implications for what is sometimes referred to as the ‘Nordic social model’. This is characterized by high levels of collective bargaining coverage to protect terms and conditions of employment.”¹⁷⁰ However, it is not just the ‘Nordic social model’ that will be affected by *Laval* and that is perhaps one of the greatest indicators of why this case has had such an impact, “The Court’s conclusion affects not just the Swedish system, but all national industrial relations systems which allow workers to strike to gain ‘recognition’.”¹⁷¹

(ii) *The Law on Pay*

Article 153(5) TFEU also specifies “pay” as being excluded from the competence of the Union in the area of social policy. Article 157(1) TFEU expands on this by stating, “Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.” Despite there being no Union competence in respect of pay, the Court conferred horizontal direct effect on Article 157(1) TFEU in *Defrenne*¹⁷² thereby establishing the far-reaching effect of social rights within the internal market. The Court emphasised that the EU, “is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of their peoples”.¹⁷³ Thus, it was held that Article 157 TFEU has a double aim: (i) to uphold both the economic and social aims of the Union; and (ii) to avoid certain Member States, whose social legislation is more developed and therefore have already implemented the

¹⁷⁰ Ibid., 145.

¹⁷¹ Syrpis and Novitz, ‘Economic and social rights in conflict: political and judicial approaches to their reconciliation’ (2008) EL Rev, 33(3): 411-426, 423.

¹⁷² Case 43/75 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* [1976] ECR 455.

¹⁷³ Ibid., [10].

principle of equal pay, from suffering a competitive disadvantage.¹⁷⁴ The staggered stages of development of social legislation across the Member States was a key instigator to conferring individual rights through the direct effect of Article 157 TFEU. However, somewhat cynically, it could be argued that the development of social progress through equal pay for men and women in the Union was motivated by an economic, as opposed to a social, objective, “As with the prohibition of nationality discrimination, this was grounded in an economic rationale, namely, the concern that certain Member States could gain a competitive advantage through cheap female labour.”¹⁷⁵ Nevertheless, the result was that this Treaty provision was the catalyst for a new body of law on equal treatment in employment and social security between men and women.

Defrenne acknowledged that the work of an air stewardess is identical to that of a cabin steward and accordingly equal pay for equal work must apply in light of the EU general principle of equality. Clearly this case and the application of Article 157 TFEU relates to equal pay between men and women and the reader may therefore be curious as to how this relates to posted workers, but it is submitted that the implication of this jurisprudence extends to equal pay between *all* men and *all* women and in turn *all* workers for equal work or work of equal value. It is well-established that workers from other Member States cannot be discriminated against,¹⁷⁶ as there is intended to be no distinction between one Member State and another, only between EU and non-EU countries, therefore, it is submitted that this principle of non-discrimination works both ways: posted workers have an opportunity to undertake work in the host State, just as host State workers must have the same opportunity to the same work, in effect, posted workers should not be prioritised over the national host State workers in accordance with the Union’s aim to establish, “a highly competitive social market economy, aiming at *full* employment and social progress [emphasis added].”¹⁷⁷ The Union is concerned with the employment of *all* of its citizens and it is submitted that through the jurisprudence of the Court and the application of Article 157 TFEU the Union must be concerned with the employment and welfare

¹⁷⁴ At the time, France had equal pay provisions and was therefore concerned that this could distort competition with the Member States that had not yet adopted equal pay provisions.

¹⁷⁵ Bell, ‘The Principle of Equal Treatment: Widening and Deepening’ in Craig and De Búrca (Editors), *The Evolution of EU Law* (Second Edition, 2011) OUP, 615.

¹⁷⁶ Article 18, TFEU, “any discrimination on grounds of nationality shall be prohibited”.

¹⁷⁷ Article 3(3), TEU.

of both the host State workers and the posted workers. Therefore, the interests of the posted workers, and therefore the service provider, should not be so readily prioritised over the host State workers and national labour interests, in light of the EU general principle of equality.

(iii) Article 28 Charter

This section on ‘Competence’ will now move on from the provisions on competence in the Treaty and will turn its attention to the Charter. Article 28 Charter states, “Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.” Therefore, strike action, which is held to be out of the remit of Union competence, is in fact protected by the Union’s Charter. However, Article 28 Charter does appear to include a reservation on this protection of the right of collective bargaining and action as it must be “in accordance with Community law and national laws and practices”. Therefore, as stated in *Viking* and *Laval*, in principle the right is protected and recognised by Union law, and mention is given to the national laws and practices too, however, in light of the primacy of Union law¹⁷⁸ it has to be “in accordance with Community law” implying that where the right restricts the fundamental freedoms, the justification and proportionality of the restriction will be subject to a very strict level of scrutiny. Moreover, Article 51(1) Charter provides that the Charter can only apply when Union law is already being implemented. Therefore, the reality is that Article 28 is only activated in the context of Union law and can only be relied upon if it complies with Union law, bringing into question the practical scope of this right. It has its limitations and reveals that even though consideration of the national laws and practices are accounted for in the Charter, they must still be consistent with the market freedoms. Equally, however, the requirement of the collective bargaining and action being “in accordance with Community law *and* national laws and practices [emphasis added]” implies that the right is only

¹⁷⁸ Case 6/64 *Costa v ENEL* [1964] ECR 585.

recognised at the Union level to the extent that it is also recognised by national law, “The EU has no competence to regulate the exercise of this right, nor can it act in a way that would deprive the right, as recognised in national law, of its essence.”¹⁷⁹ In my opinion, this summary offered by Hinarejos describes the level of Union competence perfectly; it has no place to regulate the right, and further, it cannot function so as to diminish the right as prescribed by national law. However, the prefix that it must also be “in accordance with Community law” expressly ensures the primacy of Union law, even where there is no express competence.

The provision “in accordance with... national laws and practices” of Article 28 Charter can be found in six of the twelve Articles in Chapter IV on Solidarity.¹⁸⁰ The reference to rights being in accordance with national laws governing the exercise of those rights can be seen in four other Articles of the Charter; all contained within Chapter II on Freedoms.¹⁸¹ It is submitted that the rights identified are unified by the fact that they are all culturally, economically, politically and socially sensitive to the Member States and therefore deference to the Member States’ interests must be accounted for and accordingly the Union has not been granted exclusive competence in these areas, for instance health care, education, social security, right to found a family, freedom of religion and collective action, as examples. It is the Solidarity Chapter that this thesis is most concerned with and it is interesting to note that half of the provisions in that Chapter are required to be in accordance with national laws and practices. It would appear that the Solidarity Chapter is different from the other Chapters in the Charter and this is highlighted in *N.S. and M.E.*¹⁸² The AG’s Opinion in the case recognised that, “That title, entitled ‘Solidarity’, is regarded as one of the most controversial areas in the evolution of the Charter.”¹⁸³ Accordingly, that

¹⁷⁹ Hinarejos, ‘Laval and Viking: the right to collective action versus EU fundamental freedoms’, op. cit., footnote 40.

¹⁸⁰ Article 27 Workers’ right to information and consultation within the undertaking; Article 28 Right of collective bargaining and action; Article 30 Protection in the event of unjustified dismissal; Article 34 Social security and social assistance; Article 35 Health care; Article 36 Access to services of general economic interest.

¹⁸¹ Article 9 Right to marry and right to found a family; Article 10 Freedom of thought, conscience and religion; Article 14 Right to education; Article 16 Freedom to conduct a business.

¹⁸² Joined Cases C-411/10 *N.S. v. Secretary of State for the Home Department*, and C-493/10, *M.E. and Others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform* [2011] ECR I-0000, judgment of 21 December 2011, nyr.

¹⁸³ AG Opinion, *N.S. and M.E.*, op. cit., [172].

Chapter is treated differently, “Title IV of the Charter of Fundamental Rights does not create justiciable rights applicable to Poland or the United Kingdom”.¹⁸⁴ This lack of justiciability entails that private individuals cannot rely on the Solidarity Chapter against the UK or Poland except for where the UK or Poland have provided for such rights in their national law. One of the central issues of *N.S.* and *M.E.* was the practical application of Protocol No. 30.¹⁸⁵ The existence of this qualifying Protocol highlights a fundamental issue of European labour law, “This is another illustration of the political difficulties associated with the scope of labour law rights.”¹⁸⁶ The degree of competence in this area clearly has moving boundaries and Protocol No. 30 reflects how solidarity within the Union is adopted differently between the Member States, which is an advantage in the sense of maintaining flexibility on the part of the Member States in a politically sensitive area, but it does inevitably lead to a lack of legal certainty. It is important to be aware of these differences in order to acknowledge that the Solidarity Chapter in the Charter, which contains the provision on the right of collective bargaining and action, maintains the requirement that it be in accordance with national laws and practices, hence why it was necessary for the Court to establish the lawfulness of the collective action in accordance with the national law in *Viking* and *Laval*.¹⁸⁷ However, the specific application of Protocol No. 30 was not actually at issue in *Viking* or *Laval* as the facts of those cases concerned the employment terms and conditions of Estonia, Finland, Sweden and Latvia only, not the UK or Poland.

Article 28 Charter was mentioned by the Court in both *Viking* and *Laval* as a reminder that the right to take collective action is to be protected in accordance with Union law and national law and practices.¹⁸⁸ However, it was not relied on emphatically in order to bolster the right to take collective action, instead, the Court mentioned the significance of the Charter as a whole, along with the European Social Charter, ILO Convention No. 87 and the Community Charter of the Fundamental Social Rights of Workers, in order to validate the importance of

¹⁸⁴ Ibid., [173].

¹⁸⁵ Protocol (No. 30) on the Application of the Charter, op. cit.

¹⁸⁶ Syrpis and Novitz, ‘Economic and social rights in conflict: political and judicial approaches to their reconciliation’, op. cit., footnote 16.

¹⁸⁷ Hinarejos, ‘Laval and Viking: the right to collective action versus EU fundamental freedoms’, op. cit., 723.

¹⁸⁸ *Viking*, [44] and *Laval* [91], op. cit.

fundamental rights. This is most likely due to the fact that the Charter only gained legally binding status when the Lisbon Treaty became effective, on 1 December 2009, two years after these cases were decided. Accordingly, the Charter and its future potential was more symbolic at this stage and so the Court primarily relied on the right to take collective action as a fundamental right that had been given expression by the aforementioned Charters and international instruments. It is therefore hoped that now the Charter has been granted legally binding status, Article 28 Charter and the right to collective bargaining and action will hold greater clout in the European industrial relations context.

(iv) *Albany*

The final issue to be discussed in respect of the competence of the Union is whether the social rights at issue came within the scope of the fundamental freedoms. In both *Viking* and *Laval* the Danish and Swedish Governments attempted to show that the right to strike, as a fundamental right, fell outside the scope of the free movement provisions, and in doing so drew an analogy with the case of *Albany*.¹⁸⁹ In *Albany* the Court considered whether the social goals, in respect of the promotion of collective bargaining, determined that they must fall outside the scope of the Treaty. The Court determined, “It is beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers. However, the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article [105(1) TFEU] when seeking jointly to adopt measures to improve conditions of work and employment.”¹⁹⁰ Accordingly, the Court held in *Albany* that agreements concluded in the context of collective negotiations between management and labour in pursuit of such social policy objectives must fall outside the scope of Article 105(1) TFEU. The Court’s statement that the social policy objectives “would be seriously undermined” if they came within the scope of Article 105(1) TFEU boldly supports those objectives and clearly distinguishes their special place in the Union legal order.

¹⁸⁹ Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751.

¹⁹⁰ *Ibid.*, [59].

However, the Court in *Viking* and *Laval* did not follow the same reasoning. In relation to *Viking*, AG Maduro opined, “the fact that an agreement or activity is excluded from the scope of the competition rules does not necessarily mean that it is also excluded from the scope of the rules on freedom of movement.”¹⁹¹ As exemplified here, the Court does not always treat the free movement provisions as analogous to the competition provisions in the Treaty, “the clash in *Albany* was total and would have resulted in the collective agreements being automatically void, without possible reconciliation – a reconciliation that is, however, possible in principle when a clash occurs between a fundamental right and one of the fundamental freedoms.”¹⁹² In principle, the fundamental right to take collective action can be justified where it restricts a fundamental freedom and in *Viking* and *Laval* the Court chose not to follow the same rationale as it did with the competition provisions in *Albany*, but instead, “it followed the *Schmidberger* line of cases in which a proportionality test had been used to resolve conflicts between fundamental rights and the free movement provisions.”¹⁹³ Thereby presenting the collective action with a negative starting point, “the ECJ is prevented from treating the right to strike as a positive goal of Community law... the Court’s ‘defensive’ recognition of the right to strike colours the way in which the right can be used”.¹⁹⁴

Davies argued that even if the *Albany* approach had been adopted by the Court the result may well have been the same, for the reason that “it is not clear that the *Albany* approach would have applied automatically to any collective action. The unions might still have had to show that the action was pursuing a legitimate worker-protective purpose, like the pension fund in *Albany* itself.”¹⁹⁵ However, I do not believe that the Court were ever truly tempted to apply the *Albany* reasoning; in both *Viking* and *Laval* the Court made it clear that the collective action naturally comes within the scope of the fundamental freedoms as the very essence of the functioning of the internal market in removing obstacles to

¹⁹¹ AG Opinion *Viking*, op. cit., [26].

¹⁹² Hinarejos, ‘Laval and Viking: the right to collective action versus EU fundamental freedoms’, op. cit., 721.

¹⁹³ Davies, ‘One Step Forward, Two Steps Back? The *Viking* and *Laval* Cases in the ECJ’, op. cit., 140.

¹⁹⁴ Ibid., 139.

¹⁹⁵ Ibid., 140.

the fundamental freedoms “would be compromised”¹⁹⁶ if obstacles not governed by public law, such as the collective action at issue, did not come within the scope of the free movement provisions. It is submitted that the fundamental freedoms are the centrepiece of the internal market and accordingly they are not always treated as comparable to the competition provisions in the Treaty. Therefore, once the Court had established that the social rights at issue did come within the fundamental freedoms, the Court followed the normal formula for internal market cases: fundamental freedom; restriction; justification; proportionality. The rationale in *Albany* was rejected as the legal framework of *Viking* and *Laval* clearly falls within the free movement provisions, therefore it is submitted that the formula adopted by the Court in deciding these cases was neither surprising nor wrong.

(v) *Interim Conclusion*

In conclusion, *Laval* is an internal market case in line with the freedom to provide services. The difficulty is that the restriction of the freedom is collective action; a social right that was previously assumed to be outside the scope of the Union’s competence, and further, a right that is representative of the differing national labour law systems. Social policy is a shared competence and under Article 153(1) TFEU this includes the representation and collective defence of the interests of workers and employers. However, Article 153(5) TFEU specifies certain areas that are outside of the scope, including pay and the right to strike, yet provisions on pay must be in accordance with the Court’s jurisprudence and the EU general principle of equality. Therefore, the concept of competence in this area does appear to warrant some degree of flexibility in light of the general principles and fundamental rights and it is this latter point that has changed exponentially in EU law since the *Laval* Quartet and therefore proves most interesting for future cases. Since *Laval*, Article 28 Charter has gained legally binding status and accordingly the right of collective bargaining and action would now appear to be of greater legal significance to the Court and arguably these social rights, which are considered to be the second generation of rights, should be

¹⁹⁶ *Laval*, op. cit., [98].

granted a balanced level of importance as the economic rights, which are seen as the first generation of rights. The concept of balancing the social and economic rights was advocated in *Laval*, “the rights under the provisions of the Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy”¹⁹⁷ but now, with the Charter, the Union has the legal impetus to realise its intention. Perhaps Article 28 Charter does provide scope for greater protection of individual rights now that it has legally binding status, however, significantly the Charter does not create justiciable rights as between private individuals and therefore cannot be invoked horizontally. The issue of horizontal direct effect is dealt with below.

B. Judicial Activism

The issue of competence arises once more, this time in the context of judicial activism. Bercusson submitted that by applying Articles 49 and 56 TFEU horizontally to trade unions and collective action, it will have the effect of outlawing collective action and consequently circumventing the exclusion of Union competence in this area, as prescribed by Article 153(5) TFEU.¹⁹⁸ The effect of bringing the right to strike within the scope of the Treaties inadvertently brings it within the Union’s competence, suggesting an act of judicial activism. Whether circumventing the exclusion of Union competence in this area in order to uphold the fundamental freedoms was intended by the Court is undecided; the effect clearly pertains to that possibility, yet one would hope that instead it was an indirect knock-on effect of the balancing act that the Court had to undertake in applying Articles 49 and 56 TFEU in line with the justifications and proportionality test.

The second potential act of judicial activism is represented by the Court behaving in a manner that encroached onto the legislator’s prerogatives. Following the adoption of the Directive, the Labour and Social Affairs Council specified that, in respect of the mandatory terms and conditions of employment under Article 3(1) Directive, “Member states are free, within limits, to add further

¹⁹⁷ Ibid., [105].

¹⁹⁸ Bercusson, ‘The Trade Union Movement and the European Union: Judgment Day’ (2007) ELJ, 13(3): 279-308, 289.

items to this list.”¹⁹⁹ Therefore, Article 3(1) Directive was always intended to be a non-exhaustive list, yet the Court, on its own accord, altered the political will of the legislators. This pertains to judicial activism on the part of the Court, “the legislature should be legislating and the Court should be judging – without interfering with one another.”²⁰⁰

It is submitted that the Court interpreting the Directive so stringently and potentially acting beyond its competence, as seen above, could infer judicial activism. However, in such a socially sensitive area controversial decisions are inevitable, also, the Directive itself may be the main offender in this context, “An approximate test of the quality of any given piece of secondary legislation may be offered by the number of occasions in which the Court had to interpret the terms of such text”.²⁰¹ This indicates that the Court is not entirely to blame for its interpretation of a Directive that is open to misinterpretation. The issues do appear to have been exacerbated by an external factor (the Court) due to the internal issues of the Directive itself. This conclusion provides direction for Chapter 3 in identifying the most suitable solution.

There is however one final issue to be discussed under this section that proves the Court is guilty of judicial activism in *Laval*. The Court determined that Article 56 TFEU and Article 3 Directive preclude the trade union action at issue because the action intended to force Laval to enter into negotiations with the Swedish trade unions regarding the rates of pay applicable to the posted workers and to sign a collective agreement which contained more favourable conditions than those in the relevant legislative provisions. As well as containing more favourable conditions, the Court held that the collective agreement at issue was not applicable as it did not conform to the provisions set out under Article 3(1) or (8) Directive.²⁰² It is hereby submitted that in stating that the collective agreement at issue did not conform to Article 3(8) Directive, the Court is guilty of judicial activism.

(i) The Collective Agreement

¹⁹⁹ ‘European Communities: progress at September council’, op. cit., 15.

²⁰⁰ Hatzopoulos, ‘Actively talking to each other: the Court and the political institutions’ in Dawson, De Witte and Muir (Editors), *Judicial Activism at the European Court of Justice* (2013) Edward Elgar, 108.

²⁰¹ Ibid., 122.

²⁰² *Laval*, op. cit., [71].

Article 3(1) Directive specifies that the terms and conditions of employment of the host State to be extended to the posted workers must be laid down “by law, regulation or administrative provision, and/or by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8”. Article 3(8) Directive provides that in the absence of a system for declaring collective agreements to be universally applicable, which is the case in Sweden, there is a second option:

“Member States may, if they so decide, base themselves on: - collective agreements or arbitration awards which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, and/or collective agreements which have been concluded by the most representative employers’ and labour organizations at national level and which are applied throughout national territory”.

The Directive does not specify that the applicability of these collective agreements must be explicitly declared in the implementing legislation and the wording, cited above, indicating that the Member States “may, if they so decide” seems to leave it as an option. It therefore can reasonably be understood that the Member States interpreted this to mean that *de facto* collective agreements will be applicable. However, in the questions referred for a preliminary ruling it was asked whether the trade unions can force a service provider, by collective action, to sign a collective agreement in the host country “if the situation in the host country is such that the legislation to implement Directive 96/71 has no express provisions concerning the application of terms and conditions of employment in collective agreements?”²⁰³ The need to expressly provide that the collective agreement applies in the implementing legislation is a new invention: it is not provided for in the Directive. Yet it has apparently been assumed to apply; the Court did not specify otherwise. There is a danger that these new principles can be created and then accepted as being self-evident, but where there is no legislative support for such a crucial issue in the case it is imperative that these errors are not followed.

²⁰³ Ibid., [40(1)].

Unfortunately in *Laval*, the Grand Chamber of the Court took for granted that the provision to publish the application of the collective agreement in the implementing legislation does not exist and yet the Court based its reasoning on Sweden not complying with the opportunity offered by Article 3(8) Directive.

This thesis submits that the collective agreement at issue did comply with the opportunity offered by the second limb of Article 3(8) Directive, which stipulates three conditions: (i) the collective agreement is concluded by the most representative employers' organisation at national level; (ii) the most representative labour organisation at national level; and (iii) is applied throughout national territory. The collective agreement was concluded by Sveriges Bygginindustrier which is the central organisation for employers in the construction sector²⁰⁴ and Byggnads which is the Swedish building and public works trade union and is one of the most representative trade unions in Sweden, representing over 87% of workers in the Swedish building sector.²⁰⁵ Finally, the collective agreement is the collective agreement for the building sector.²⁰⁶

Unfortunately, the requirement created by the Court to publish the collective agreement as applying in the implementing legislation has also been accepted in the literature, "It is obvious from *Laval* and *Rüffert* that the boxes of Art.3(8) of the Directive must be very fully ticked to have a 'qualifying' collective agreement";²⁰⁷ and, "the Court of Justice requires Member States positively to opt into either of these possibilities [provided by Article 3(8) Directive]";²⁰⁸ and, "Sweden... deprived itself of the option to allow other broadly applicable collective agreements to set standards by failing explicitly to make use of that option.";²⁰⁹ and, "Wage fixing in Sweden is essentially a (collective) bargaining matter. The Swedish Act on implementation of the PWD²¹⁰ is based on this, but contains no provision to that effect nor any explicit stipulation that existing

²⁰⁴ Ibid., [18].

²⁰⁵ Ibid., [17].

²⁰⁶ Ibid., [18].

²⁰⁷ Kilpatrick, 'Laval's regulatory conundrum: collective standard-setting and the Court's new approach to posted workers' (2009) EL Rev, 34(6): 844-865, 856.

²⁰⁸ Barnard, "British jobs for British workers": the Lindsey Oil Refinery dispute and the future of local labour clauses in an integrated EU market' (2009) ILJ, 38(3): 245-277, 255.

²⁰⁹ Kilpatrick, 'The ECJ and Labour Law: A 2008 Retrospective' (2009) ILJ, 38(2): 180-208, 202.

²¹⁰ Act (1999:678) on Posting of Workers.

collective agreements may be applicable.”²¹¹ However, this thesis loudly proclaims that this was not just yet another example of the Court’s overly restrictive interpretation of the Directive; the Court made a blatant mistake, Article 3(8) Directive should never have been interpreted in this way as that interpretation was never available: the Court relied upon it erroneously.

AG Mengozzi argued that the option provided for by Article 3(8) Directive is “merely a possibility offered to Member States”,²¹² which was corroborated in the ‘Country Report’ on Sweden’s transposition of the Directive.²¹³ However, the Court did not deliberate this point raised by AG Mengozzi at all, which is so critical to the clarity of the way in which the Member States have transposed the Directive, and instead ignored AG Mengozzi’s advice and firmly stated without further definition that the “Member State has not made use of the possibility provided for in the second subparagraph of Article 3(8) of that directive.”²¹⁴

So where did the Court gather inspiration to establish this principle? There are two possibilities: firstly, the Commission’s Communication of 2003 specified that collective agreements that are generally applicable, in accordance with Article 3(8) Directive, *must* make explicit mention thereof in the legislation implementing the Directive, “If their implementing legislation makes no reference to this effect, Member States *may not* oblige [service providers posting their workers] to observe the collective agreements [emphasis added]”.²¹⁵ This is very bold and definite language from a non-binding instrument that does not reflect the text of the applicable legislation, “Member States *may*, if they so decide...[emphasis added]”. If the Court based its judgment on this provision it reveals that it has based its judgment on a non-binding instrument that was published four years after the deadline for transposition.²¹⁶ The second possibility is that there is one

²¹¹ Evju, ‘Revisiting the Posted Workers Directive: Conflict of Laws and Laws in Contrast’ in Barnard and Odudu (Editors), *The Cambridge Yearbook of European Legal Studies* (2009-10 Volume 12) Hart, 175.

²¹² AG Opinion *Laval*, op. cit., [179].

²¹³ Cremers, *In search of cheap labour in Europe: Working and living conditions of posted workers*, op. cit., 147.

²¹⁴ *Laval*, op. cit., [67].

²¹⁵ Commission Communication COM(2003) 458 final, op. cit., Section 4.1.2.1.

²¹⁶ The Commission’s Communications do not have to be avidly followed in the Court’s judgments, indeed they are often not even referred to, as discussed above, in Case C-490/04 *Commission v Germany*, the Court chose not to rely on the Communication from the Commission (2006) 159 final, which expressed that declarations are permitted, whereas the Court ruled that

other place in which this requirement has been expressed: the 1993 amended Proposal for the Directive. Article 4(3) of the amended Proposal stated that, in the interests of legal certainty, “Member States shall ensure that official information on the collective agreements which are generally applicable within the meaning of Article 3(4) is published by a competent authority and readily available to the undertaking referred to in Article 2 [service provider]. Failing such information the undertaking in question shall not be bound by the abovementioned collective agreements.”²¹⁷ Therefore, the amended Proposal stated that collective agreements which are deemed to be generally applicable, and not universally applicable, have to be published; if they are not published, the undertaking will not be bound by the collective agreement. The effect of this provision is that it would have made collective agreements even harder to apply in practice, therefore, during the Council and the Parliament’s co-decision on the Directive, the provision was removed and thus never appeared in the final Directive. It is submitted that the provision’s removal nullified the requirement. This indicates that the Court either relied on a non-binding instrument or a nullified requirement in an out-dated Proposal over the legislation and accordingly was *ultra vires*.

(ii) *Interim Conclusion*

It is very disappointing, and somewhat surprising given the amount of attention and doctrinal criticism this case has received, that this technical point has been accepted in the academic literature without further investigation, “The Court’s – however cursory – observation (offered three times over) is that Sweden ‘has not made use of the possibility provided for in the second subparagraph’ of Article 3(8).”²¹⁸ The requirement implicit in this reasoning evidently is that if a State wishes to ‘so decide’ pursuant to Article 3(8), some form of explicit mention of this must be made in the legislation implementing the PWD.”²¹⁹ To date, I have not read anything in the literature that expressly raises the fact that Article 4(3) amended Proposal was deleted so that the final Directive does not instruct

requiring foreign temporary employment agencies to make a declaration in respect of the posted workers was not permitted.

²¹⁷ Commission Amended Proposal for Directive COM(1993) 225 final, op. cit., Article 4(3).

²¹⁸ See *Laval*, paras. 62-72.

²¹⁹ Evju, ‘Revisiting the Posted Workers Directive: Conflict of Laws and Laws in Contrast’, op. cit., 175.

Member States to declare the applicability of collective agreements in the implementing legislation and in spite of this the Court relied on that provision as the basis of its reasoning.

In respect of judicial activism in the posted workers' cases the usual issues have been presented in the literature, such as the scope of Article 3 Directive being "drastically circumscribed".²²⁰ However, the original critique of the Court's judgment in *Laval* offered in this thesis does not guarantee that the outcome would have been in favour of the trade unions; after all, the Court also specified that the collective agreement contained more favourable conditions than those in the relevant legislative provisions. Nevertheless, the issue at least needed to be considered by the Court and should have been raised by the trade unions' legal team.

What this finding does confirm is that the Directive clearly needs to be amended in order to clarify these apparent ambiguities. The issue also reveals the Court's meagre significance bestowed on collective agreements, given that this collective agreement was so easily and readily dismissed. Finally, the Court's error elicits a deeper issue of accepting the Court's assumptions of the law as being self-evident when in fact there should be an awareness that there may be other factors inciting a decision from the Court, including an ever-expanding caseload²²¹ and inevitable time pressure, "in a difficult case, speed may come at the expense of quality."²²²

C. Horizontal Direct Effect

In *Laval* the two parties at dispute were private parties and therefore the application of EU law in this private law case had to be invoked horizontally. The horizontal direct effect of Article 56 TFEU, and potentially the Directive as well, was one of the most contentious issues of the case and, along with *Viking*, changed the scope of the law in this area. This section will therefore discuss the

²²⁰ Hatzopoulos, 'Actively talking to each other: the Court and the political institutions', op. cit., 121.

²²¹ Biondi and Ripley, 'Recent Developments in Luxembourg: The Activity of the European Union Courts in 2011' (2012) EPL, 18(4): 599-622, 599.

²²² Sharpston, 'Transparency and Clear Legal Language in the European Union: Ambiguous Legislative Texts, Laconic Pronouncements and the Credibility of the Judicial System' in Barnard and Odudu (Editors), *The Cambridge Yearbook of European Legal Studies*, op. cit., 418.

horizontal application of the Treaty and then the horizontal application of the Directive, followed by a discussion on what the outcome may have been if the cases had in fact come under the scope of public law, concluding with an analysis of how the Court applied the proportionality test.

(i) Horizontal Direct Effect of the Treaties

A provision is capable of direct effect when the substance of the provision is sufficiently precise and unconditional.²²³ In principle, Treaty provisions, regulations and international agreements are capable of both vertical and horizontal direct effect, whereas directives and decisions are only capable of vertical direct effect. However, prior to *Viking* and *Laval*, the horizontal application of the Treaties against trade unions initiating industrial action remained undetermined and was not confirmed or thought to be entirely appropriate. Therefore, it is arguable that one of the most striking conclusions that came from these cases was the confirmation from the Court, “without much explanation”,²²⁴ that trade unions, as private parties, can be bound directly by Articles 49 and 56 TFEU when initiating industrial action. In this respect, these cases are the seminal judgments on the issue.

Prior to the judgments, the Commission took the view that Article 49 TFEU could not be applied horizontally by a private undertaking against a trade union in respect of the union’s collective action and accordingly, Articles 49 and 56 TFEU only applied to regulatory measures adopted by quasi-public bodies.²²⁵ However, that was not the case here as there was no delegation of state authority and the Court has made it clear that trade unions are not public bodies.²²⁶ Furthermore, in his Opinion in *Laval*, AG Mengozzi stated that trade unions cannot be considered as being a quasi-public body so as to legitimise vertical direct effect, “I do not believe that that obstacle can be overcome by the attempt, appearing in *Laval*’s written observations, to widen the concept of a State in such a way that, in the present case, trade unions are regarded as a subdivision of the

²²³ *Defrenne*, op. cit.

²²⁴ De Witte, ‘Direct Effect, Primacy, and the Nature of the Legal Order’ in Craig and De Búrca (Editors), *The Evolution of EU Law* (Second Edition, 2011) OUP, 334.

²²⁵ Bercusson, ‘The Trade Union Movement and the European Union: Judgment Day’, op. cit., 288.

²²⁶ *Viking*, op. cit., [60].

Swedish State, against which Laval could then directly invoke Directive 96/71”.²²⁷ On this latter point, Bercusson drew a parallel between the horizontal application of the Treaties and the fact that directives do not have horizontal direct effect but can only be invoked vertically against the State and ‘emanations of the State’²²⁸ accordingly, “If the same criteria were to apply to horizontal direct effect of Articles [49 and 56 TFEU], trade unions are not such bodies.”²²⁹ Trade unions are not public bodies and neither are they emanations of the State, therefore, there is an uneasiness about applying Articles 49 and 56 TFEU horizontally against a trade union. However, it is apparent that the Treaties, as primary law, differ greatly from the secondary law of directives and as such the parallel drawn between the two is not that convincing as the Treaties automatically have greater leverage in their application.

In *Laval* the Court justified the horizontal application of Article 56 TFEU against the Defendant trade unions as follows:

“compliance with Article [56 TFEU] is also required in the case of rules which are not public in nature but which are designed to regulate, collectively, the provision of services. The abolition, as between Member States, of obstacles to the freedom to provide services would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organisations not governed by public law.”²³⁰

The Court corroborated this justification with evidence of its previous case law.²³¹ However, despite following the logic of its previous case law, this leaves us with two problems, as identified by Barnard,²³² firstly, the ruling bestows the same responsibilities on trade unions as it does the State, but it does not provide trade

²²⁷ AG Opinion *Laval*, op. cit., [136].

²²⁸ Case C-188/89 A. *Foster and others v British Gas plc* [1990] ECR I-3313.

²²⁹ Bercusson, ‘The Trade Union Movement and the European Union: Judgment Day’, op. cit., 289.

²³⁰ *Laval*, op. cit., [98].

²³¹ Case 36/74 *Walrave and Koch* [1974] ECR 1405, [17 and 18]; Case C-415/93 *Bosman and Others* [1995] ECR I-4921, [83 and 84]; Case C-309/99 *Wouters* [2002] ECR I-1577, [120].

²³² Barnard, ‘*Viking and Laval*: a Single Market perspective’ in Ewing and Hendy, *The New Spectre Haunting Europe – The ECJ, Trade Union Rights, and the British Government*, op. cit., 23.

unions with the same ‘get out clause’ such as the public policy derogation in Article 3(10) Directive, and further, if we are to consider the Treaty derogations, they were all made with the public body in mind, not private actors, “public policy, public security or public health.”²³³ Secondly, *Laval*’s reasoning above specifies that Article 56 TFEU applies to rules which are not public in nature but which “collectively” regulate the provision of services which introduces the dilemma of whether individual strikers can be included within this scope. Presumably, the action of an individual striker would be considered as being too remote as the Court has only identified action undertaken by “associations or organisations not governed by public law.”

To summarise the Court’s conclusion on this matter and in spite of prior uncertainties in this area, it has now been determined that trade unions, as private parties that act collectively, are required to comply with Articles 49 and 56 TFEU. The effect of this decision by the Court is that trade unions must be on the defensive and be prepared to justify their actions, “by imposing a direct obligation on the trade unions rather than on the State, the trade unions must now shoulder the burden of justifying their activities in every instance, something that may be considered undesirable.”²³⁴ It is undesirable because collective action is recognised as a fundamental right and the Court’s decision has clearly prioritised the fundamental freedoms above fundamental rights, which introduces scepticism as to how seriously social rights are truly valued in the EU against economic values. The Union originated as an economic vehicle with an emphasis on trade and as much as the Treaties have been amended, it is submitted that it is the decisions of the Court that reveal how Union law is actually interpreted and used in practice and therefore where its values are expressed. The difficulty with *Viking* and *Laval* is that they have received so much attention, described as being “Two of the most remarkable human rights cases decided by the European Court of Justice”,²³⁵ that it is difficult to ignore these two particular rulings and the priority that was granted to the fundamental freedoms over the fundamental rights.

The apparent scepticism of trade unions shown by the Court by placing them on the defensive could be due to the fact that, “National unions’ attempts at

²³³ Article 52, TFEU.

²³⁴ Hinarejos, ‘Laval and Viking: the right to collective action versus EU fundamental freedoms’, op. cit., 728.

²³⁵ Ibid., 714.

worker protection may also be regarded as examples of protectionism.”²³⁶ The purpose of trade unions is to protect the workers that they represent, but this worker protection overlaps with protecting national jobs, which is important in the domestic sphere but viewed as a threat to market integration in the Union sphere. It is submitted that, in achieving any sort of congenial balance here, the Court must recognise that collective industrial action is not a form of protectionism.

Viking and *Laval* demonstrate that unfortunately for trade unions they do not have the freedom like other private actors to pursue their private interests without the constraint of direct effect, “The German Government argued that trade unions represent the interests of workers and direct effect would affect their freedom of association.”²³⁷

(ii) *Horizontal Direct Effect of the Directive*

As aforementioned, in principle, directives are only capable of vertical direct effect, therefore, the main bone of contention in this respect is that the Court placed such a heavy reliance on a Directive in private law. The Directive was discussed at length in *Laval* and the preliminary reference was made on the interpretation of the Directive and Articles 18 and 56 TFEU and the final judgment expressly refers to Article 3 Directive and Articles 56 and 57 TFEU. Clearly, the application of the Directive to this extent was made by the Court and the doctrine of direct effect provides for EU law to be invoked in the national courts, but the reference for its interpretation was made by the Swedish Labour Court. Thus, the reliance on the Directive and its influence on this private law case cannot be denied.

It was previously held that there can be no direct effect of provisions containing obligations for private parties.²³⁸ However, despite the fact that directives do not ‘officially’ have horizontal direct effect, as per the previous jurisprudence of the Court, directives are intended to be binding as to the result to be achieved:

²³⁶ Davies, ‘One Step Forward, Two Steps Back? The *Viking* and *Laval* Cases in the ECJ’, op. cit., 148.

²³⁷ Bercusson, ‘The Trade Union Movement and the European Union: Judgment Day’, op. cit., 289.

²³⁸ *Defrenne*, op. cit.; Case 14/83 *Sabine von Colson* [1984] ECR 1891; Case 152/84 *Marshall* [1986] ECR 723; *Faccini Dori*, op. cit.

“in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article [288 TFEU] of the Treaty.”²³⁹

Therefore, even if it can be argued that there was no explicit direct effect of the Directive in *Laval*, its provisions were thoroughly evaluated in light of the facts and were relied on as far as possible in order to attain the result pursued by the Directive, in the interests of achieving harmonious interpretation through indirect effect. In my opinion, it is somewhat artificial to suggest that there was absolutely no horizontal direct effect of the Directive in the case when there has to be such a delicate manipulation of the nuances between horizontal direct effect, indirect effect and incidental effect in order to defend that in principle there is no horizontal direct effect of directives when, in reality, no matter how careful and precise the rhetoric, it has exactly the same result as if the Directive was comfortably and openly expressed as being capable of being relied on in private law. Clearly, the purpose of stating that there is no horizontal direct effect of directives ensures that the discretion given to Member States in implementing directives means that private parties may only derive rights from the acts of national authorities and further, it maintains the distinction between regulations which are directly applicable compared to directives which are not. However, the distinction has become more blurred in recent years, revealing that the judge-made law tirelessly expressing that, technically, there is no horizontal direct effect of directives is a forced and somewhat unfeasible principle, as exemplified by the case law below.

The recent ruling of *Prigge*²⁴⁰ revealed how fundamental rights can be applied in private law. In this case three pilots had their employment contracts automatically terminated when they reached the age of 60. The applicants brought an action on the grounds that they were victims of age discrimination and

²³⁹ Case C-106/89 *Marleasing* [1990] ECR I-4135, [8].

²⁴⁰ Case C-447/09 *Reinhard Prigge and Others v Deutsche Lufthansa AG* [2011] ECR I-0000, judgment of 13 September 2011, nyr.

therefore their employment contracts should continue as the difference in treatment, on the grounds of age, is contrary to the general principles of EU law and/or Directive 2000/78/EC (the Framework Directive)²⁴¹ which regulates non-discrimination of, *inter alia*, age in the workplace. The Court agreed and in reaching this decision, the Court was required to apply the Framework Directive in a private law case thereby by-passing the prohibition of horizontal direct effect of directives. This case is now part of a line of case law that has taken such an approach and it would appear that the Court has now confirmed the strong-hold of directives in national private law, amid the previous legal uncertainty and lack of legitimate expectation in this area.

First, there was *Mangold*²⁴² which is “one of the most controversial judgments to be delivered by the Court of Justice (ECJ) in recent years”.²⁴³ In the same way as it did in *Prigge*, the Court found the prohibition of discrimination on grounds of age to be a general principle of EU law that had been given expression by the Framework Directive. However, at the time of the facts in the case, the Directive’s time limit for implementation had not yet expired, nevertheless, the Directive – even if the Court was unwilling to expressly admit it – was granted horizontal direct effect. Five years later in *Küçükdeveci*²⁴⁴ the Court once again gave horizontal direct effect to the Framework Directive, again invoking the principle of non-discrimination on grounds of age. Finally, *Prigge* has confirmed the Court’s application of directives in national private law, specifically German national private law; all three cases were referred from the German courts. Presumably, the Court could not simply invoke Article 21 Charter; the non-discrimination provision, as these cases were of a domestic nature and the Charter is only activated in the context of Union law, therefore a remedy from the national court was required. “It has been argued that the Court’s understanding of when a dispute will fall within the scope of the Treaties, for the purposes of triggering the general principles of Union law, has been stretched to (or even beyond) its

²⁴¹ Directive 2000/78/EC of the Council of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L303/16.

²⁴² Case C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR I-9981.

²⁴³ Dougan, ‘In Defence of *Mangold*?’ in Arnall, Barnard, Dougan and Spaventa (Editors), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (2011) Hart, 219.

²⁴⁴ Case C-555/07 *Seda Küçükdeveci v Swedex GmbH & Co.* [2010] ECR I-365.

tolerable constitutional limits by rulings such as *Küçükdeveci*.²⁴⁵ And it is hereby submitted, also by *Mangold* and now *Prigge* as well.

In light of these cases, if the legislator were to deny the horizontal direct effect of directives at this stage it would implicate that the judiciary were either *ultra vires* or that they arrived at their previous decisions accidentally *per incuriam*. Consequently, one must ask where *Laval* and the application of the Posted Workers Directive fits into this jurisprudence? In the three cases mentioned above the Framework Directive was invoked as the applicants relied on the EU law general principle of non-discrimination on the grounds of age, however, in *Laval* the Applicants' main argument was that their freedom to provide services had been restricted, accordingly, with or without the Directive, *Laval* was able to invoke Article 56 TFEU, which, as discussed above, is less controversial to apply horizontally than the Directive. Whereas the three age discrimination cases required the medium of the Framework Directive to give expression to the general principle. As such, the Court was not forced to rely on the Directive in *Laval*; as the Treaty provision was available. In the interests of maintaining the distinguishing features of directives, it can be argued that there was not an absolute applicability of the Directive in *Laval*. However, that does not negate the fact that the Court relied heavily on the Directive to determine the acceptable level of collective action.

This is a highly sensitive area and in principle it does seem sensible to hold on to the premise that directives do not have horizontal direct effect for the reason that the effect of individuals being able to invoke directives in private national law, as well as creating more rights for its citizens, also imposes more duties on private parties and as the EU is not intended to have competence in national private law, this could be seen as competence creep masked by the carefully selected and precise rhetoric of the Court. Having said that, in my opinion, it cannot be denied that the *Laval* judgment does rely on both Article 56 TFEU and Article 3 Directive as precluding the collective action at issue in the case, logically, it would infer that the Court relied on the secondary legislation, as well as the Treaty, horizontally against the social partners.

²⁴⁵ Dougan, 'In Defence of *Mangold*?', op. cit., 244.

(iii) *Whether Sweden Transposed the Directive Incorrectly*

A possible way around the prohibition of the horizontal direct effect of directives is the application of Member State liability. As opposed to invoking the Directive horizontally against the Defendant trade unions, which clearly remains to be an undetermined and uncertain route, *Laval* could have instead brought proceedings for damages against the State, “Incidentally, [the rulings of *Viking* and *Laval*] may also pave the way in the future for a *Francoovich*-type of damage claims against private actors for breach of the market freedoms.”²⁴⁶ Member State liability can arise whereby a State has failed to apply or implement EU law correctly.

One of the major concerns in *Laval* was how the Swedish State transposed the Directive.²⁴⁷ The choice of form and method of implementing a Directive is to be left to the Member States.²⁴⁸ In *Laval*, the Court recognised that “the purpose of Directive 96/71 is not to harmonise systems for establishing terms and conditions of employment in the Member States, the latter are free to choose a system at the national level which is not expressly mentioned among those provided for in that directive”.²⁴⁹ Therefore, provided that it does not hinder the provision of services, the Court expressly accepted that Member States are free to adopt an implementation mechanism of their own in respect of the Directive. Sweden does not have a statutory minimum rate of pay and therefore relies heavily on collective bargaining and agreements. In *Laval* the minimum wage was not specified in the collective agreement but left to be negotiated on a case-by-case basis between the service provider and the relevant trade union. As highlighted by Davies, “the Court took exception to the requirement for what it referred to as ‘case-by-case’ negotiations... This process was presented as too onerous and uncertain for firms.”²⁵⁰ It is stated in the primary law and accepted by the judiciary that Member States may implement the Directive exactly as they wish; it is their prerogative. Sweden had their own system of implementing collective agreements and this is supported by the means of collective action.

²⁴⁶ Hinarejos, ‘Laval and Viking: the right to collective action versus EU fundamental freedoms’, *op. cit.*, 729.

²⁴⁷ Davies, ‘One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ’, *op. cit.*, 137.

²⁴⁸ Article 288, TFEU.

²⁴⁹ *Laval*, *op. cit.*, [68].

²⁵⁰ Davies, ‘One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ’, *op. cit.*, 129.

Consequently, for the Court to conclude that the method and form of Sweden's national labour law system constitutes a restriction to the freedom to provide services reveals how far the Court are willing to go to protect the Union legal order. The potential impact of this cannot be underplayed; as demonstrated by the atmosphere prior to the judgment in *Laval*, "The fact that the legitimacy of the Swedish model is to be tried by the ECJ has caused consternation and Swedish trade unions have warned that a negative outcome might imply an end to Swedish EU membership."²⁵¹

Laval and the Estonian, Latvian, Lithuanian, Polish and Czech Governments opined that Sweden transposed the Directive incorrectly and therefore as there is no system for declaring collective agreements to be of universal application in Swedish law and they did not make use of Article 3(8) Directive, *Laval* and the aforementioned Governments stated that Sweden waived the right to apply the terms and conditions of employment laid down in collective agreements to posted workers.²⁵² AG Mengozzi did not agree with this as he argued that the option provided for by Article 3(8) Directive is "merely a possibility offered to Member States".²⁵³ Therefore, the fact that Sweden opted not to use that possibility, but left it to both sides of industry to determine the employment conditions by means of a collective agreement, does not constitute an inadequate implementation of the Directive. As aforementioned, this thesis is in agreement with the Opinion of AG Mengozzi on this point; the wording of Article 3(8) Directive indicates that *de facto* collective agreements which are generally applicable and/or collective agreements which have been concluded by the most representative employers' and labour organisations at national level can be extended to posted workers.

Sweden transposed the Directive prior to the deadline for transposition, "Sweden implemented the [Directive] through a new Act: the Posting of Workers Act that entered into force in December 1999."²⁵⁴ Thereby complying with the implementation provision as set out under Article 7 Directive and then expressed the applicable terms and conditions of employment in line with their own labour

²⁵¹ Cremers, Dølvik and Bosch, 'Posting of workers in the single market: attempts to prevent social dumping and regime competition in the EU' (2007) IRJ, 38(6): 524-541, 534.

²⁵² AG Opinion *Laval*, op. cit., [169].

²⁵³ Ibid., [179].

²⁵⁴ Cremers, *In search of cheap labour in Europe: Working and living conditions of posted workers*, op. cit., 146.

system. The rules for setting out how a collective agreement can be relied upon are the same for all Member States as prescribed by the Directive, however, it is left up to the Member States as to how they choose to implement those rules into their national law. Therefore, the method of implementation does not pertain to an incorrect transposition of the Directive by Sweden, but rather the problem lies with the lack of clarity in the legislation itself which has led to ambiguous interpretations of the law.

(iv) Public Law or Private Law?

Laval gave authority to the freedom to provide services under Article 56 TFEU conferring rights on private undertakings which may be invoked against a trade union or an association of trade unions. However, the question that will be addressed here is whether the case could have been brought against the State and if so, whether the result would have been the same.

In accordance with the free movement of goods, the Court has chosen not to extend the reach of Articles 34 and 35 TFEU to the activities of private parties. This is exemplified in *Schmidberger*²⁵⁵ which dealt with protesters restricting the free movement of goods and accordingly was brought vertically against the State. Environmental protesters in Austria undertook a demonstration on the Brenner motorway, which is the main transit route between Germany and Italy. Schmidberger, a German haulage company, could not transport timber and steel between Germany and Italy during the demonstration and therefore brought an action against Austria for granting permission to the demonstration. The Court held that the restriction of the free movement of goods was permitted as the action was justified by the freedom of expression and the freedom of assembly, guaranteed by Articles 10 and 11 ECHR. The activity was proportionate as it was a one-off 30 hour demonstration on a single route that abided by national law and provided alternative routes to those that would be affected by the demonstration so as to minimise the restriction as far as possible and the measure was indistinctly applicable.

²⁵⁵ Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* [2003] ECR I-5659.

Therefore, provided the restriction has a valid justification and the action is proportionate to the objective pursued, the Court's position on fundamental rights is that they are a legitimate interest that are capable of justifying a restriction of the internal market.²⁵⁶ However, the case did raise concerns about the extent of the obligation on the State to interfere with the exercise of fundamental rights.²⁵⁷ This is one of the main differences between *Schmidberger* and *Viking* and *Laval*; in *Viking* and *Laval* the spotlight turned on the private parties and their right to take collective action as opposed to the State's action and therefore brings into question how suitable *Schmidberger* was as an authority for these cases. In *Viking* AG Maduro believed that even if the case was constructed in accordance with public law, the result would have been the same, "the present case could theoretically have come to the Court in the framework of proceedings against the Finnish authorities for failing to curtail collective action against Viking Line. It would not have affected the substance of the problem: how to reconcile Viking Line's rights to freedom of movement with the rights to associate and to strike of the FSU and the ITF?"²⁵⁸ Personally, I am not entirely convinced by this; *Viking* and *Laval* could theoretically have been brought vertically against the State, indeed, in *Laval* the police were asked to intervene, but were unable to do anything as collective action is lawful under Swedish law, however, if the onus of restricting the fundamental freedom was on Finland and Sweden and not the private parties, the ramifications of such a public law decision would have been less far-reaching. If we are to accept that the right to strike comes within the scope of the internal market then we have accepted that it is subject to its judicial scrutiny, but the crux of the matter is that this was used directly against the private parties, revealing how far the Union's jurisdiction may reach. The obligation on the Member States is to take adequate steps to ensure the fundamental freedoms remain free from restrictions, which is pertinently revealed in *Schmidberger* whereby the goods were merely passing through Austria en route for Italy and Germany,²⁵⁹ yet the Commission argued that it was Austria's obligation to ensure the free movement of the goods. It would now transpire from

²⁵⁶ This was also demonstrated in Case C-36/02 *Omega Spielhallen – und Automatenaufstellungs – GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609.

²⁵⁷ Biondi, 'Free Trade, a Mountain Road and the Right to Protest: European Economic Freedoms and Fundamental Individual Rights' (2004) EHRLR, 1: 51-61, 57.

²⁵⁸ AG Opinion *Viking*, op. cit., [40].

²⁵⁹ *Schmidberger*, op. cit., [62].

Viking and *Laval* that the obligation to ensure the fundamental freedoms remain free from restrictions has stretched to the private parties as well, even where they are exercising their fundamental right to strike.

It has been argued that “the balancing approach adopted in *Schmidberger* shares greater similarities with a test of unreasonableness than that of proportionality”,²⁶⁰ therefore, the precise application of the proportionality test in *Schmidberger* as an authority carries its own set of uncertainties. It can therefore be concluded that the cases did rely on *Schmidberger* as an authority, but not stringently; if *Schmidberger* had been followed more rigorously then it may have been determined that the fundamental right at issue was in fact justified and proportionate and capable of restricting a fundamental freedom as the collective action was in accordance with national law, the trade unions were exercising their freedom of expression and freedom of assembly as guaranteed by Articles 10 and 11 ECHR and arguably, the collective action was not targeted specifically at the posted workers simply because they were established in another Member State – the issue was that they were not subject to equal terms and conditions of employment.

(v) *The Proportionality Test*

The principle of proportionality is provided for in accordance with Article 5(4) TEU, “Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.” This necessity test is malleable in order to fulfil its purpose as a judicial tool applied by the judges so that it is flexible enough to take into account the facts on a case-by-case basis. However, in the interests of applying the test with an appropriate level of precision and legal certainty, its parameters have been honed to formulate a tripartite test:

- (1) Is the measure suitable to achieve a legitimate aim?
- (2) Is the measure necessary to achieve that aim?

²⁶⁰ Biondi, ‘Free Trade, a Mountain Road and the Right to Protest: European Economic Freedoms and Fundamental Individual Rights’, op. cit., 51.

(3) Does the measure have an excessive effect on the applicant's interests?²⁶¹

It is to be remembered that some discretion was left to the national court in *Viking* in respect of proportionality, however, the Court provided guidance by stating that the restriction could be justified by an overriding reason of public interest provided that it is proportionate which should be determined as follows, "the restriction is suitable for ensuring the attainment of the legitimate objective pursued and does not go beyond what is necessary to achieve that objective."²⁶² Whereas in *Laval*, the Court applied the proportionality test, however, it is submitted that the potential for a justification in this case was so remote in the context of making the collective action conditional on signing the collective agreement and the Swedish law which was held as being discriminatory, thereby having access to fewer potential justifications,²⁶³ accordingly, as the Court decided fairly readily that there were no potential justifications, the proportionality test arguably became a secondary consideration.

The horizontal application of the Treaties in *Viking* and *Laval* reveals the intricate issues of applying the proportionality test to trade union action, "the extension of the direct effect of Treaty provisions relating to free movement so as to catch the actions of trade unions is problematic, especially in the light of the tests for justification and proportionality employed by the Court."²⁶⁴ The use of the proportionality test in private law has shifted the perception of how the test is expected to be used; in the context of the right to strike, the proportionality test was not used in terms of the State's permission or restriction of the right but focussed on the strike action itself as a restriction to the fundamental freedoms. This perspective entails that as the Court has applied the Treaty provisions to the private action directly rather than indirectly, the onus is placed on the trade unions to ensure that they act proportionately in every instance.²⁶⁵ The effect of this highlights the most contentious issue surrounding the application of the proportionality test in *Viking* and *Laval*; its use in the industrial relations context.

²⁶¹ Chalmers, Davies & Monti, *European Union Law* (Second Edition, 2010) CUP, 367.

²⁶² *Viking*, op. cit., [90].

²⁶³ *Laval*, op. cit., [110 and 119].

²⁶⁴ Syrpis and Novitz, 'Economic and social rights in conflict: political and judicial approaches to their reconciliation', op. cit., 411.

²⁶⁵ Hinarejos, 'Laval and Viking: the right to collective action versus EU fundamental freedoms', op. cit., 722.

Davies' greatest concern with *Viking* and *Laval* was arguably the Court's use of the proportionality test in this context, "The rulings in *Viking* and *Laval* have the potential to involve the courts in a much more politically sensitive set of questions as they seek to apply the proportionality test to unions' strike action."²⁶⁶ It has been argued that the use of the judicial tool in this way requires a very sensitive and practical application of the test, which the Court has failed to demonstrate:

"In practical terms, the limited recognition afforded to the right to strike by the ECJ is manifested in the use of the proportionality test to regulate it... Proportionality requires a detailed understanding of the legal and factual background. The ECJ is not a labour court and in *Viking* and *Laval* it did not show much sensitivity to the industrial relations context... the *Viking* and *Laval* decisions show that there is a deep uncertainty within the EU about the role of the trade union movement."²⁶⁷

One of the re-occurring issues of the Court is its lack of expertise on all of the numerous areas that it is asked to adjudicate, which is inevitable given the breadth of its jurisdiction and the expanding docket.

The lack of sensitivity demonstrated by the Court in the industrial relations context was magnified in its use of the proportionality test, as it would appear that, "the more the strike restricts the employer's free movement rights – and thus the more effective it is from the union's perspective – the harder it will be to justify."²⁶⁸ Under the scope of the proportionality test, it is required that the action undertaken is the least restrictive possible in order to pursue the legitimate aim. Alternatives to strike action have been suggested, for example, the union could have protested outside of working hours, undertaken a march, leafleting or exercised action short of a strike such as an overtime ban.²⁶⁹ However, these alternatives, which clearly would be less restrictive on the employer's free movement rights, are not comparable to the effectiveness of collective action

²⁶⁶ Davies, 'One Step Forward, Two Steps Back? The *Viking* and *Laval* Cases in the ECJ', op. cit., 146.

²⁶⁷ Ibid., 148.

²⁶⁸ Ibid., 142.

²⁶⁹ Ibid., 143.

which constitutes a strike supported by sympathy action. These less restrictive options should not be viewed as genuine alternatives by the Court, “there is a real danger here that the courts will identify alternatives without considering their effectiveness in the bargaining process. Again, this could prove highly restrictive of the right to strike.”²⁷⁰ This resonates with the re-occurring issue that has threaded its way through the issues revealed by *Viking* and *Laval*: the Court’s innate preference towards the fundamental freedoms over the fundamental rights. Which is apparent given the fact that it is the Court’s duty to uphold the Treaties²⁷¹ and even though the Court has satisfactorily voiced the importance of fundamental rights, the actual act of balancing the fundamental rights against the fundamental freedoms was executed through the application of the proportionality test and the Court’s approach to that task in *Viking* and *Laval* was geared towards placing the employer’s free movement rights as the primary interest and the secondary consideration was how far the collective action restricted the employer’s rights. As opposed to placing the collective action as the primary interest and considering how far the employer’s free movement rights would restrict that action. The latter approach is not compatible with the case law of the Court at issue, which has shown that the fundamental freedoms have a natural advantage in light of the proportionality test.

(vi) Interim Conclusion

Laval confirmed that Article 56 TFEU is capable of being applied horizontally by a private undertaking against a trade union or an association of trade unions. As the Treaty provision was relied upon, the horizontal direct effect of the Directive was not confirmed either way, therefore, as much as the Court relied on Article 3 Directive in its reasoning, ultimately, the Court can argue that in the end it was the primary, not the secondary, legislation that was applied. In respect of Sweden’s transposition of the Directive, it is submitted that the collective agreement in *Laval* was in compliance with the second limb of Article 3(8) Directive and as Sweden transposed the Directive on time and it was left up to the Member States

²⁷⁰ Ibid., 143.

²⁷¹ Article 19, TEU.

as to how they chose to implement those rules into their national law, Sweden transposed the Directive correctly.

This section examined the private/public law context and it has been concluded that the fundamental issue was initially placing the collective action within the scope of the Treaties, once that had been established it is submitted that if the case had been brought against the Swedish State, instead of the trade unions, it would not have made a substantial difference to the Court's reasoning. This is because if the case was brought against the State the Court would have still focussed on the action of the trade unions in light of potential justifications and the proportionality test. The application of the proportionality test in both *Viking* and *Laval* was criticised in light of the Court's application of this test in the industrial relations context and its apparent lack of sensitivity therein. It is understandable that this will be a sensitive issue as the Court does not have the equivalent expertise or familiarity of a labour court, however, it cannot be expected to as its role is so all-inclusive.

D. EU Law versus National Law

This section will detail the importance of collective action to the Swedish labour system, with a review of the appropriate labour standards applied in *Laval*, emphasising the more favourable terms provision under Article 3(7) Directive. Finally, this section will consider the broader impact the judgment has had; on a wider scale, beyond the labour law context, one of the main issues with *Laval* was the apparent subjugation of national law, even in an area that was intended, by the Treaty, to be left to the Member States' competence. Therefore, this thesis will look to the future and conclude with an analysis of the place of social rights in an economically-gearred market.

(i) Collective Action in the Swedish Labour System

The importance of national labour law was lost in the Court's treatment of the right to strike. Collective action is emblematic of the differences between the national labour law models, "For Continental labour lawyers, often from systems with a constitutionally enshrined right to strike, the Court's approach comes as

something of a shock. It changes the presumption that striking is lawful subject to limitations which are narrowly construed, into a presumption that striking, at least in the context of transnational disputes, is unlawful subject to justifications which are narrowly construed.”²⁷²

Swedish law relies heavily on trade unions to negotiate with their employer on site to come to an agreement in respect of payment, “In Denmark, Finland and Sweden, normally at least seven of every ten employees are members of trade unions. In countries on the European continent – except for Belgium – the corresponding number varies between one and four.”²⁷³ This “autonomous collective bargaining model”²⁷⁴ is typical of the Nordic regulatory model and the infamy of *Laval* is that this well-established Nordic model was held as being a restriction to the provision of services. In breaking the consensus of the significance of the Swedish labour model, the Court has also done itself a disservice, “Ironically, the bargaining system established in Sweden and other Nordic countries is often described as the model for ‘flexicurity’ currently being promoted by the European Commission. By requiring ‘universally applicable’ legislation the Court’s judicial activism may be seen as threatening not only autonomous collective bargaining structures in the Member States, but also the flexibility inherent in the European Social Model and, in particular, the Open Method of Coordination.”²⁷⁵

Therefore, in *Laval*, the Court not only subjugated the autonomous collective bargaining model but also the right to undertake collective action, which is lawful under Swedish law. Added to this is the fact that the judgment was made in December 2007 which coincided with the start of the Global Recession and the automatic transitional measures on the ten new EU Member States, predominantly from lower wage countries, had ended. These factors contributed to a fear of social dumping and uncertainty in respect of employment in the EU, therefore making the Swedish unions’ reaction more relatable and understandable, and perhaps even necessary. Not only do trade unions have a

²⁷² Barnard, ‘EU ‘Social’ Policy: From Employment Law to Labour Market Reform’ in Craig and De Búrca (Editors), *The Evolution of EU Law* (Second Edition, 2011) OUP, 667.

²⁷³ Malmberg and Sigeman, ‘Industrial Actions and EU Economic Freedoms: The Autonomous Collective Bargaining Model Curtailed by the European Court of Justice’ (2008) CML Rev, 45(4): 1115-1146, 1118.

²⁷⁴ Ibid.

²⁷⁵ Zahn, *German and British labour law in a European context following European Union enlargement* (2011) PhD Thesis, The University of Edinburgh, 105.

particular strong-hold in the workings of the Swedish labour system but in any legitimate labour law system the pursuit of collective action and the right to voice your own interests must be supported; it is an expression of democracy.

The right to take collective action in Sweden is protected as a constitutional right in accordance with Article 17 of Chapter 2 Regeringsformen (Swedish Basic Law), which provides the following, “Any trade union or employer or association of employers shall be entitled to take strike or lock-out action or any similar measure unless otherwise provided by law or arising out of an agreement.”²⁷⁶ It is submitted that the importance of collective action in the Swedish labour system, and the ‘Nordic social model’ generally, was not granted as much importance by the Court as a constitutional right should.²⁷⁷ The importance of the right to strike was recognised as a fundamental right in accordance with various European Charters and international instruments that were cited by the Court, but there was a distinct lack of due importance bestowed upon the Swedish constitutional law itself. One possible explanation for this could be that, “the Court... prefers to avoid citing national constitutions for reason of the considerable differences between them.”²⁷⁸ Alternatively, one might suggest, somewhat cynically, that the outcome of the case was always clear to the Court and therefore it was reluctant to stress the importance of the national constitutional right specifically, aware of the fact that it would ultimately be quashed by the over-riding importance of the freedom to provide services and therefore not wanting to pit the Union law against the national law too starkly.

In *Laval* AG Mengozzi recognised the importance of collective bargaining to the Swedish labour law system, “the Swedish model of collective employment relations grants considerable autonomy to both sides of industry, guided by the principle that such parties are responsible for and regulate their own conduct.”²⁷⁹ The freedom to engage in trade union activities constitutes a general principle of labour law, yet the bargaining power of unions clearly will vary from case-to-

²⁷⁶ EU Agency for Fundamental Rights ‘National Constitutional Law Related to Article 28 – Right of Collective Bargaining and Action’: http://infoportal.fra.europa.eu/InfoPortal/infobaseShowContent.do?btnCat_308&btnCountryBread_195 [accessed 28 November 2012].

²⁷⁷ In comparison to the importance granted to the concept of “human dignity” as part of the German Constitutional Law in *Omega*, op. cit.

²⁷⁸ Morijn, ‘Balancing Fundamental Rights and Common Market Freedoms in Union Law: Schmidberger and Omega in the Light of the European Constitution’ (2006) ELJ, 12(1): 15-40, 18.

²⁷⁹ AG Opinion *Laval*, op. cit., [160].

case, therefore it is an ever-present consideration in the context of the Union that the trade unions must ensure their collective action does not disproportionately restrict the free movement rights. It is apparent that “In both *Viking* and *Laval*, the unions’ collective action was highly – perhaps even unusually – effective. The shipowners were deterred from re-flagging the *Rosella* in *Viking*, and *Laval*’s Swedish subsidiary ultimately became insolvent.”²⁸⁰ The collective action demonstrated in these cases was highly successful and consequently highly restrictive to the free movement rights.

Collective action is an area that is generally thought to be outside the competence of the Union, in light of Article 153(5) TFEU, and therefore it would typically be considered an area in which the Court would defer to the Member States’ interests more readily, particularly an area that represents a constitutional right to the Member State concerned. Also, paragraph 22 of the Preamble to the Directive vows to respect the Member States’ laws on collective action, “Whereas this Directive is without prejudice to the law of the Member States concerning collective action to defend the interests of trades and professions”. This adds another layer to the ‘shock factor’ that inevitably ensued from the Court’s jurisprudence.

(ii) *Labour Standards*

This section provides an analysis of the labour standards that were applied, in accordance with the collective agreements at issue. In respect of the applicable standards as provided for by the legislation, *Laval* states the following, “with regard to workers posted in the framework of a transnational provision of services, their employer is required, as a result of the coordination achieved by Directive 96/71, to observe a nucleus of mandatory rules for *minimum protection* in the host Member State [emphasis added].”²⁸¹ The employer is required to observe the “minimum protection” guaranteed to posted workers, as prescribed by the Directive, and seemingly, no more than that. It is a floor of protection but the Court’s emphasis on abiding by the minimum would seem to turn this into a

²⁸⁰ Davies, ‘One Step Forward, Two Steps Back? The *Viking* and *Laval* Cases in the ECJ’, op. cit., 136.

²⁸¹ *Laval*, op. cit., [108].

ceiling of rights. The Swedish collective agreement at stake consisted of higher terms and conditions of employment than the Latvian collective agreement and it also contained terms which went beyond the minimum protection guaranteed by the Directive²⁸² which was held as not being justified by the objective of protecting workers, since the Directive already serves this purpose. However, it is submitted that the Court construed Article 3(1) Directive very narrowly, yet the legislation does not provide anything to warrant such a narrow interpretation; especially when considering the purpose of Article 3(7) Directive which advocates the application of terms and conditions of employment that are more favourable to workers.

It is *prima facie* illogical that the Court did not rule in favour of applying the Swedish collective agreement when it contained more favourable terms than those in the Latvian collective agreement and Article 3(7) Directive provides that the more favourable terms should apply. However, “In the case at hand, the builders’ union was unduly forcing Laval to accept better conditions than those foreseen in the Directive; only if Laval accepted these conditions was the union willing to reach an agreement to pay.”²⁸³ As Laval did not accept the higher conditions the trade unions undertook collective action that proved to be a disproportionate restriction on the service provider’s freedom and although Article 3(7) Directive needs to be taken into account; it must be in conformity with Article 56 TFEU.

The Swedish collective agreement required the workers to be paid €16 per hour and in accordance with the agreement this would have been open to negotiation, however, if a different wage could not have been agreed upon, there was a fall-back rate of €12 per hour. Laval paid its workers in accordance with the Latvian collective agreement which equated to a monthly rate of €1,500. Unfortunately, no rate per hour is provided by the AG’s Opinion or the Court’s judgment, however, if the average week is 40 hours²⁸⁴ and there are 4 weeks per month, there would be 160 hours per month ($40 \times 4 = 160$), therefore, the hourly

²⁸² Ibid., [85].

²⁸³ Hinarejos, ‘Laval and Viking: the right to collective action versus EU fundamental freedoms’, op. cit., 716.

²⁸⁴ The exact times of work on the Vaxholm site are not provided in this case but the 40 hours per week figure is based on the Arbetstidslagen (Swedish Working Hours Act) which provides under Section 5 that, “Regular working hours shall not exceed 40 hours a week.” Arbetstidslagen (Swedish Working Hours Act): <http://www.av.se/lagochratt/at1/kapitel02.aspx> [accessed 8 October 2012].

wage for the Latvian collective agreement would be just over €9 ($1,500 \div 160 = 9.375$). Please bear in mind as well that this figure is the lowest possible hourly wage that would have been paid by Laval, considering the maximum working time in Sweden is 40 hours (as an example, if the working week was 35 hours then on the same basis the hourly wage would have been €10.71). Also, this wage was supplemented by various benefits in kind, therefore, when comparing the gross wages paid by Laval and those stipulated by the fall-back clause of the Swedish collective agreement, the wages may have been very similar. However, it is submitted that there are 'hidden costs' involved with posting workers and it should clearly be determined whether the benefits in kind paid by Laval constituted part of the wage or not, as prescribed by Article 3(7) Directive, allowances specific to the posting are to be considered as part of the minimum wage, however the reimbursement of travel, board or lodging expenditure which is incurred because of the posting does not constitute part of the wage. Again, the case does not specify what those benefits in kind constitute. Therefore, supposing that the benefits in kind did constitute part of the wage, a comparison between the fall-back clause and the €9 plus benefits in kind would be a comparable wage, however, if the benefits in kind did not constitute part of the wage, and if we are to take the €16 per hour as the starting point, this would mean that the Latvian workers were being paid nearly half of what the Swedish workers were being paid on the same site which would inevitably lead to growing feelings of hostility on the site and a greater likelihood of collective action as a result. It is submitted that even if the former approach was adopted in calculating the wage, so that the wages were more comparable, the fact remains that in applying two different collective agreements the host State workers would still have benefitted from a more favourable wage.

Due to a lack of factual information it is difficult to determine precisely how favourable the wages were in the Swedish collective agreement, compared to the Latvian collective agreement, however in spite of these apparent uncertainties, these aspects of the case have to be considered so that the necessity and proportionality of the collective action may be realised. Accordingly, it would appear that, "Emphasis is placed on the clarity of obligations to be imposed on service providers, at the expense of the improvement of terms and conditions for

posted workers.”²⁸⁵ Consequently, this also compromises achieving a harmonious work environment as the posted and host State workers are subject to differing conditions on the same site.

(iii) Social Rights as an Obstacle to Economic Free Movement

As detailed above, in *Schmidberger*, the freedom of expression and the freedom of assembly were justifiably held to restrict the free movement of goods, therefore, to assume that economic freedoms automatically trump social rights is simply not true. In *Omega*²⁸⁶ it was also held that the fundamental right at issue was capable of restricting the fundamental freedom. The facts of the case are as follows: Omega, a German undertaking, had been operating a “laserdrome” in Bonn, Germany. The equipment used by Omega, including the laser guns and sensory tags fixed to the players’ jackets, was supplied by the British company Pulsar International Ltd. There had already been public opposition to the opening of the game and eventually the Bonn police authority issued an order against Omega forbidding it from “playing at killing”²⁸⁷ and a fine would be imposed for each game played in breach of the order.

The contested order prohibited Omega from operating the laserdrome in accordance with the form of the game developed by Pulsar and under the franchising system, therefore restricting the freedom to provide services. It was determined that the reason for the restriction was that the laserdrome condoned acts of simulated homicide and the trivialisation of violence, contrary to fundamental values in the public opinion.²⁸⁸ Furthermore, the concept of human dignity is a German constitutional right, as set out in the first sentence of Paragraph 1(1) of the German Basic Law. Therefore, as fundamental rights form an integral part of the general principles of Union law, the protection of those rights is a legitimate interest which, in principle, may justify a restriction of a fundamental freedom, provided that the restriction may be justified on public policy grounds and is proportionate. The Court held that the commercial

²⁸⁵ Syrpis and Novitz, ‘Economic and social rights in conflict: political and judicial approaches to their reconciliation’, op. cit., 416.

²⁸⁶ *Omega*, op. cit.

²⁸⁷ *Ibid.*, [5].

²⁸⁸ *Ibid.*, [7].

exploitation of a “killing game” in Omega’s laserdrome constituted an affront to human dignity and in the interests of protecting public policy the national measure was able to restrict the economic activity.

Omega highlights that, “the concept of public policy may vary from one country to another and from one era to another.”²⁸⁹ From my perspective, hearing a game played in a laserdrome described as “simulated homicide” and the “trivialisation of violence” seems far removed from the reality and objective of the game, in short, it is absurd. However, it would be a mistake to judge this subjectively and that is the very essence of the EU; to appreciate and accept the differences which we may not all be able to relate to but nevertheless they are present and accordingly must be respected. The moral standards of society are fluid and are required to change and adapt to the evolving society that it represents. The Basic Law of Germany, which expressly states the concept of human dignity, came into effect in 1949, subsequent to the devastation of World War II and the Holocaust. Understandably, therefore, the concept of “human dignity” as expressed in the German constitutional law has a special meaning and significance and is of paramount importance to the German public not because of some “lasertag” game but because of a much wider political and historical background. Nevertheless, the concept of what constitutes public policy in Union law, particularly as a justification for a derogation from a fundamental freedom, must be interpreted strictly, “so that its scope cannot be determined unilaterally by each Member State... Thus, public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society.”²⁹⁰ To conclude: constitutional rights of the Member States must be respected in light of the public interests of that society, but equally, they also have to fit in to the overall concept of the Union as a whole.

Schmidberger and *Omega* both represent that where there is a conflict between fundamental rights and fundamental freedoms the Court is capable of recognising the ability of fundamental rights to justifiably restrict economic freedoms, on the basis that the Union is also obliged to protect fundamental rights and it was predicted in both the AGs’ Opinions to these case that this may

²⁸⁹ Ibid., [31].

²⁹⁰ Ibid., [30].

represent a new line of case law.²⁹¹ The aim of the action that restricts the fundamental freedom is relevant to the discretion granted to its justification, “The stated aim is an important element to estimate the effect.”²⁹² The fundamental rights exercised in *Schmidberger* and *Omega*; the freedom of expression and the freedom of assembly and the right to human dignity respectively, were clearly deemed to proportionately reflect their stated aims that could be justified in light of protecting the interests of public policy, “Clearly, if demonstrators had decided to use the Brenner motorway as a space for performing drama or for promulgating neo-Nazi opinions, the authorities would, it is submitted, have been under an obligation, as a matter of both Community and Convention law, to weigh that purpose in the balance.”²⁹³ The circumstances by which the fundamental right has been invoked must be taken into account by the Court, but in principle, this ‘balancing’ of the purpose of the fundamental right against the freedom that it restricts conceptually undermines the exercise of the fundamental right, “The need ‘to reconcile’ the requirements of the protection of fundamental rights cannot therefore mean weighing up fundamental freedoms against fundamental rights per se, which would imply that the protection of fundamental rights is negotiable.”²⁹⁴

It is submitted that fundamental rights are negotiable for the reason that they are not absolute, as exemplified in *Viking* and *Laval*, but equally, neither are the fundamental freedoms, as exemplified in *Schmidberger* and *Omega*. Interestingly, all four cases were decided prior to the Charter attaining legally binding status and it has been predicted that the impact of the Charter may effect the balance of fundamental rights against fundamental freedoms, “when assessing the facts of *Schmidberger* in light of the specific wording of the Charter the fundamental rights invocation by the Austrian state will no longer be a *derogation* from Union law but rather an act inherent in its *implementation*.”²⁹⁵ This sentiment bestows a great deal of significance on the impact of the Charter and predicts a change to the well-established jurisprudence of the internal market; restrictions on the economic freedoms within the Union shall be prohibited.

²⁹¹ AG Opinion *Schmidberger*, op. cit., [89]; AG Opinion *Omega*, op. cit., [44].

²⁹² Morijn, ‘Balancing Fundamental Rights and Common Market Freedoms in Union Law: Schmidberger and Omega in the Light of the European Constitution’, op. cit., 29.

²⁹³ Brown, ‘Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v. Austria*. Judgment of 12 June 2003, Full Court.’ (2003) CML Rev, 40: 1499-1510, 1505.

²⁹⁴ AG Opinion *Omega*, op.cit., [53].

²⁹⁵ Morijn, ‘Balancing Fundamental Rights and Common Market Freedoms in Union Law: Schmidberger and Omega in the Light of the European Constitution’, op. cit., 31.

“Using the language of *prima facie* breach or restriction of economic rights suggests that, even if the restriction is ultimately justified, it remains something which is at its heart “wrong”, but tolerated. This sits rather uneasily with the State’s usually paramount constitutional obligation to protect human rights.”²⁹⁶ The pre-conception that any restriction, including fundamental rights, to the fundamental freedoms are to be prohibited already places fundamental rights in internal market case law on the back-foot. However, it is important to bear in mind that the protection of human rights is not only the State’s obligation, but also the Union’s; fundamental rights that create a direct link between Union policies and Union citizens, such as the freedom of expression and the right of collective bargaining and action, entail that they are part of the implementation of Union law.²⁹⁷ Accordingly, fundamental rights are capable of complementing the fundamental freedoms and the two can be viewed as inextricably linked, “The rationale for free movement is market integration. Market integration is premised on market efficiency. Market efficiency requires collective action by workers and trade unions to ensure their voice is heard and their interests are taken account of.”²⁹⁸

The stated aim of the collective action was to protect workers and worker protection is a legitimate justification, as revealed by the Court’s case law, however, in *Laval* the Court deployed an unduly scrupulous justification process and proportionality test to the collective action that was deemed restrictive to the freedom to provide services. In light of the fact that the right to take collective action in Sweden is protected as a constitutional right, just as human dignity is protected as a German constitutional right in *Omega*, this suggests that the Court did not grant the right to take collective action equal weight in the balancing process. It is submitted that there was nothing to warrant such a narrow approach taken by the Court. Furthermore, the Court granted the service provider undue leniency, “the Court’s findings seem to indicate *considerable sympathy* for an employer that is placed under pressure to enter into exclusive negotiations with a trade union without knowing what the precise outcomes may be [emphasis

²⁹⁶ Brown, ‘Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v. Austria*. Judgment of 12 June 2003, Full Court.’, op. cit., 1508.

²⁹⁷ Morijn, ‘Balancing Fundamental Rights and Common Market Freedoms in Union Law: Schmidberger and Omega in the Light of the European Constitution’, op. cit., 33.

²⁹⁸ Bercusson, ‘The Trade Union Movement and the European Union: Judgment Day’, op. cit., 290.

added].”²⁹⁹ The social rights at issue in both *Viking* and *Laval* were voiced and explicitly stated to be of great importance to the Union legal order, however, it is submitted that in the end, the economic considerations were favoured and therefore prioritised over the social rights, “the choices which the Court has made in the *Viking* and *Laval* cases represent a tipping of the delicate balance between economic and social rights in favour of the former.”³⁰⁰ Accordingly, the collective action was an obstacle to the free movement rights and the close scrutiny applied to the action was seemingly at the expense of the host State workers and the posted workers, thereby negating the stated aim of the fundamental right, evidencing that both *Viking* and *Laval* signify the apparent threat to social standards in the Union legal order.

This apparent threat has generated concerns for the future, “the criticisms concerning the fact that the more effective a strike is, the more difficult it will be to justify it, or the fact that the ECJ seems only concerned with the welfare of the workers currently employed by *Viking*, rather than also thinking of those that will follow in the future, are, in my opinion, warranted.”³⁰¹ The impact of these cases is undeniably far-reaching, yet the Court took a very precise and stringent view of a snap-shot of industrial action, “the focus of the ECJ on justification of strike action with reference to the ‘protection of workers’, which is defined very much in terms of workers’ immediate economic interests.”³⁰² This short-term view of industrial action could be reflective of the temporary nature of posted workers, indicating that this context does not warrant permanent concern. However, the fact is that the repercussions of these judgments do not merely reflect a momentary view of Union law but represent the way in which social rights and economic freedoms are balanced by the Court and evidently the Court’s approach taken in these judgments verifies the position of social rights as being a legitimate hindrance to economic free movement.

(iv) Interim Conclusion

²⁹⁹ Syrpis and Novitz, ‘Economic and social rights in conflict: political and judicial approaches to their reconciliation’, op. cit., 423.

³⁰⁰ Ibid., 419.

³⁰¹ Hinarejos, ‘Laval and Viking: the right to collective action versus EU fundamental freedoms’, op. cit., 728.

³⁰² Novitz, ‘The impact of *Viking* and *Laval*. Contesting the social function and legal regulation of the right to strike’ in Ales and Novitz (Editors), *Collective Action and Fundamental Freedoms in Europe: Striking the Balance* (2010) Intersentia, Social Europe Series Volume 23, 257.

Laval represents the clash between EU law and national law and also the clash between economic and social rights, as has been detailed in this section. The first point raised assessed the Court's disappointing treatment of autonomous collective bargaining and its lack of recognition of the success of this model, "Self-regulation means that conflicts of interests are often solved efficiently at local or sectoral level."³⁰³ The importance of collective action to the Swedish labour model was also discarded; corroborated by the lack of due importance granted to this constitutional right, as highlighted by the comparison with the treatment of the constitutional right in *Omega*.

It has been argued that this apparent lack of acknowledgement of the national labour law system will result in the Member State having to adapt its legislation to avoid another *Laval*-type ruling, "It now seems it [Sweden] will have to adapt to the judgment by regulating minimum pay centrally."³⁰⁴ However, following the *Laval* judgment, in April 2008 the Swedish Government pursued an alternative route and ran an inquiry which culminated in a revised Act, known as the "Lex Laval", in April 2010. The Lex Laval is based on three essential components:³⁰⁵ (i) Section 5a of the Act lays down four conditions whereby trade unions may undertake industrial action, the fourth of which specifies that industrial action cannot be taken if the service provider shows that the posted workers' conditions of employment are essentially at least as favourable as the conditions in the Swedish collective agreement. However, it has been argued that trade unions should be able to require the service provider to confirm the conditions by signing a collective agreement, "Then they would have a contractual right to control what the employer has actually paid to its workers and a collective agreement that it can invoke before a court."³⁰⁶ (ii) Trade unions have to 'filter'³⁰⁷ their collective agreements to determine the hardcore conditions

³⁰³ Cremers, *In search of cheap labour in Europe: Working and living conditions of posted workers*, op. cit., 150.

³⁰⁴ Hinarejos, 'Laval and Viking: the right to collective action versus EU fundamental freedoms', op. cit., footnote 6.

³⁰⁵ Cremers, *In search of cheap labour in Europe: Working and living conditions of posted workers*, op. cit., 148.

³⁰⁶ Ahlberg, 'The Age of Innocence – and Beyond' in Evju (Editor), *Cross-Border Services, Posting of Workers, and Multilevel Governance* (2013) University of Oslo, 315.

³⁰⁷ Cremers, *In search of cheap labour in Europe: Working and living conditions of posted workers*, op. cit., 148.

under Article 3(1) Directive which could be somewhat artificial; and (iii) to ensure transparency, trade unions have to submit these collective agreements to the Work Environment Authority. Thus, regulating wages and terms of employment continues to be the responsibility of the social partners, however, the revised Act has curbed the freedom to undertake industrial action, “unions argue that Lex Laval is an over-implementation of the judgments, with too far-reaching restrictions on the right to strike”.³⁰⁸ Notably, the Swedish Government’s inquiry in the lead up to the Lex Laval ran parallel to the implementation of the Services Directive and the Swedish Labour Court’s judgment³⁰⁹ on damages in *Laval*, which was just as unyielding in its treatment of trade union action as the ECJ.

This section then discussed the applicable labour standards in *Laval*, including a calculation and comparison of the presumed wage rates in both the Latvian and Swedish collective agreements. The difficulty presented here is that the Swedish collective agreement clearly offered more favourable wages and yet, in spite of Article 3(7) Directive, the more favourable terms could not apply as in the circumstances of the case they breached Article 56 TFEU and as the Directive stipulates a “minimum protection” the Court was able to take that at face value and read it as the only protection prescribed. It is submitted that if the posted workers had undertaken collective action to demand the more favourable terms apply to them, then the result may have been different as that would have been a more outward representation of worker protection, but as it came from the host State workers it could be read as national protectionism.

Finally, this section assessed the role of social rights as an obstacle to economic free movement with a detailed analysis of *Schmidberger* and *Omega*; two cases in which the Court permitted fundamental rights to restrict fundamental freedoms, “*Schmidberger* was a straightforward case for the Court to decide. On the facts, the result cannot have come as much of a surprise. There will however be other, more difficult, cases on the horizon which will test the Court’s stance on

³⁰⁸ Ibid., 149.

³⁰⁹ Swedish Labour Court Judgment No. 89/09 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundet and Svenska Elektrikerförbundet* [2009] Case No. A 268/04 (Unofficial English translation by Jur. Dr Laura Carlson).

the ‘human v. economic’ rights interface”.³¹⁰ Three years later *Viking* and *Laval* were those more difficult cases on the horizon.

E. Local Unemployment at Times of Recession

The *Laval* ruling came at the very start of the Global Recession and at times of recession, when local unemployment is at its highest, the concern to protect the domestic labour market and the issue of social dumping will be magnified. Added to this is the fact that the Directive makes provision for cheaper labour in the Union by setting a minimum standard, which in reality, may be lower than the going rate. Therefore, this section will consider whether local hiring clauses are compatible with Union law.

(i) “British Jobs for British Workers”

This issue was discussed by Barnard³¹¹ in the context of the Lindsey oil refinery dispute. In 2009 Total UK, owner of the Lindsey oil refinery, decided to invest in a new de-sulphurisation unit. It was decided that a sub-contractor was required in order to complete specific aspects of the project and following a competitive tendering procedure, consisting of seven European companies with five being from the UK, the contract was awarded to IREM, an Italian company. IREM declared that it would use 300 of its own Italian and Portuguese workforce, which is possible when relying upon Article 56 TFEU and the Directive, and therefore did not need any additional local British labour. Italian and Portuguese workers were posted to the Lindsey oil refinery in Lincolnshire, UK and consequently British workers protested that at a time of deep recession in the UK and increasing unemployment, a contractor with a public commitment to corporate social responsibility (CSR) was refusing to hire local workers. The protests included wildcat strikes and unofficial industrial action which was supported by sympathy action at other sites. Despite being unofficial, the collective action was well-organised and it spread across the UK. It is important to appreciate the atmosphere

³¹⁰ Brown, ‘Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v. Austria*. Judgment of 12 June 2003, Full Court.’, op. cit., 1510.

³¹¹ Barnard, “‘British jobs for British workers’: the Lindsey Oil Refinery dispute and the future of local labour clauses in an integrated EU market’ (2009) ILJ, 38(3): 245-277.

in which the Lindsey dispute arose; it was in the wake of the *Laval* Quartet and therefore the first well-publicised UK case in which the posting of workers were seen to be taking local jobs. It was the tipping point and the proximity of events enabled “the unions to use the Lindsey dispute as a vehicle to continue to air their dissatisfaction with the Court of Justice’s decisions in *Viking*, *Laval* and the subsequent case law.”³¹² The issue became a political one as the Lindsey dispute gained support beyond the ambit of trade unions, unfortunately with interest from the British National Party (BNP). Also, in 2007 Gordon Brown, the ex-UK Prime Minister and leader of the Labour Party, had promised, “British jobs for British workers.”³¹³ This controversial statement, when used out of context, may provide the less-informed with a presumed innate hereditary right in the public procurement process. If taken at face value it clearly breaches the principles of the EU, however, in his keynote address, Brown speaks at length of British values and this statement directly relates to job creation, as opposed to discriminating others for not being British. To write the Lindsey dispute off as an act of national protectionism fails to appreciate its reality, “The unions, however, supported by the European Parliament, argued that painting their action as protectionist was wrongly to condemn it through cheap caricature.”³¹⁴

In order to reach a settlement, the contractors agreed to hire 102 locally sourced workers (these 102 jobs had not yet been filled therefore none of the posted workers would lose their jobs). However, this neither satisfied the British workers nor the internal market principles as the “locally sourced workers” included any workers walking into the local job centre; including nationals from other Member States. Also, intending to prioritise employment to local staff implies indirect discrimination and therefore does not satisfy the needs of the Union. Further issues in the dispute ensued including redundancies and more bouts of unofficial industrial action as a result before a settlement was finally reached which involved reinstating all of the workers that had undertaken collective action. The Advisory, Conciliation and Arbitration Service (ACAS) was used to reach the settlement. The chief executive of ACAS, John Taylor, said

³¹² Ibid., 260.

³¹³ BBC News ‘full text of Gordon Brown’s speech to the Labour conference as party leader’ 24 September 2007: http://news.bbc.co.uk/1/hi/uk_politics/7010664.stm [accessed 27 April 2010].

³¹⁴ Kilpatrick, ‘British Jobs for British Workers? UK Industrial Action and Free Movement of Services in EU Law’ (2009) LSE Law, Society and Economy Working Papers, 16, 6.

of the dispute, “Whilst the report shows no evidence of the law being broken there is a source of tension around the Posted Workers Directive and its application to construction work and the UK’s industrial relations system. These issues have been highlighted by the recession.”³¹⁵

This “source of tension” has been heightened by media interest and the Directive has been cast as the main offender, highlighted by the fact that it governs the movement of *temporary* labour, “It is the short-term, fast-buck culture that is at the root of this, so we have to look at what incentives we can give companies so they do not rely on a pool of short-term temporary labour that will come to this country and go away again.”³¹⁶ Ed Miliband, leader of the Labour Party, could be talking about posted workers here, revealing that this legal issue has generated a political debate on what is an emotive dispute concerning workers’ livelihoods and national autonomy, “The Total dispute provides an interesting case study of what happens when EC provisions on the four freedoms come face to face with angry protesters fearful about their jobs at a time of deep recession.”³¹⁷ This is a delicate matter, which in the wrong hands, may unearth more sinister truths, such as British euro-sceptics using cases like Lindsey to generate dislike in respect of belonging to the internal market and even more dangerous, political parties such as the BNP revealing xenophobic tendencies under the ruse of sustaining national independence. These issues have escalated beyond the ambit of the Directive and its jurisdiction; which is concerned only with the posting of workers in the framework of the provision of services. However, it is inevitable that the subtle intentions of the Directive can be overlooked when on the face of it: the Directive appears to support the employment interests of non-nationals over nationals, in the interests of service provision.

A particular issue that has surfaced from the Lindsey dispute regards tax, “The unions feel that these major infrastructure projects, funded by the British taxpayer, should benefit British labour, at least in part.”³¹⁸ However, the local workforce cannot rely on this argument as it would directly benefit the domestic employment market which would be discriminatory in the context of the Union

³¹⁵ BBC News ‘Acas backs refinery dispute firm’ 16 February 2009: <http://news.bbc.co.uk/1/hi/uk/7892656.stm> [accessed 12 April 2010].

³¹⁶ Wintour, ‘Change rules on migrant workers, says Miliband’ 22 June 2012, The Guardian.

³¹⁷ Barnard, “‘British jobs for British workers’: the Lindsey Oil Refinery dispute and the future of local labour clauses in an integrated EU market”, op. cit., 277.

³¹⁸ Ibid., 253.

and thereby breach Article 18 TFEU which provides that any discrimination on grounds of nationality shall be prohibited. Nevertheless, the threat to jobs in the national labour market is clearly a problem that has been exacerbated by the Union, therefore, what solutions can the Union provide? The next section will discuss whether contracting authorities can require suppliers to use local labour.

(ii) An Obligation to use Local Labour

Barnard, in her article concerning the Lindsey dispute, attempts to manoeuvre carefully amongst the obligations of Union legislation whilst trying to incorporate domestic concerns by tactfully relying on the objectives of the Union such as aiming at full employment and social progress³¹⁹ to determine whether contracting authorities can require suppliers to use local labour. Barnard answered this by focussing on the award stage and the performance stage of the procurement regime.

Barnard suggests that at the performance stage of the contract it could be required that a social requirement of the contract is to hire a certain percentage of long-term unemployed workers. Which would be *prima facie* less discriminatory and therefore arguably more justifiable than specifying that only long-term unemployed *local labour* may be used. The requirement to use “local labour” is incompatible with Union law, no matter how the expression is phrased, “While combating unemployment is an issue for the EU as a whole, every job given to a local is a job not given to a non-local, usually a non-national.”³²⁰ Barnard also considered the award stage of the contract to implement the social requirement. The fundamental difficulty in this respect is that social considerations will be secondary to the ultimate aim of having the contract fulfilled by the most economically beneficial tender. Therefore, with the ease of free movement of cheaper labour coming from new Member States of the Union, it is commercial common sense to opt for an economically advantageous tender over other social considerations, such as opting for a tender that will employ locally sourced and currently unemployed labour. There is no obligation on contracting authorities to

³¹⁹ Article 3(3), TEU.

³²⁰ Barnard, ““British jobs for British workers”: the Lindsey Oil Refinery dispute and the future of local labour clauses in an integrated EU market”, *op. cit.*, 268.

exercise their social conscience; the principal aim of the contract is to have it fulfilled, any additional advantages this grants to society is simply viewed as a bonus. Therefore, relying on an altruistic attitude of all contracting authorities may not be wholly feasible, but in reality, the public perception of the company will, at least indirectly, affect its business. Consequently, in attempting to maintain a decent reputation and to avoid public scenes being reported in newspapers of trade unions blockading sites, it is in the interests of the contractor to consider their actions in the public eye, before acting. Completing the contract is 'the constant' for the contractor, it formulates the unchanging concern and any social considerations will involve a variety of changing variables, differing opinions, and at times of recession these secondary concerns may be considered a luxury that cannot be adhered to; as the priority is to award a contract which will in any case generate employment for some. Barnard concludes that if argued carefully there is room for social requirements in the context of public procurement, "underpinning this argument is a view of the European Social Model that goes beyond the traditional economic-versus-social paradigm and looks instead at social policy as being part of a multi-layered system where an interpretation of the four freedoms provides space for other EU policies to be pursued, such as employment, regional and cohesion policies, which in themselves provide space for national or sub-national action."³²¹ Barnard's argument which was superbly presented provides hope in an area that has generated a great deal of anger and bad-feeling. However, no solid solution has yet been provided for this predicament.

In its interpretative communication on public procurement and the possibilities for integrating social considerations into public procurement, the Commission states, "a clause stipulating that a successful tenderer must employ a certain number or percentage of long-term unemployed or apprentices, without requiring the unemployed or apprentices to be from a particular region or registered with a national body, for instance for the execution of a works contract, should not, *a priori*, amount to discrimination against tenderers from other

³²¹ Ibid., 277.

Member States.”³²² Clearly, the provision must comply with Union law and cannot discriminate on the grounds of nationality, but there is room for these social provisions, provided that they are phrased in such a way that will be deemed compatible with Union law.

Discrimination on grounds of nationality is prohibited and it is submitted that this works both ways: just as a certain percentage of Italian or Portuguese workers may be used, a certain percentage of British workers can also be used on the British site, “No European worker should be barred from applying for a British job and absolutely no British worker should be barred from applying for a British job.”³²³ There is a concluded assumption that workers in their own country are not the ones in danger of discrimination, hence the emphasis on prohibiting discrimination of non-nationals, but the case law reflects a different reality; it is the host State workers that fear losing their jobs to posted workers whose position has been prioritised in favour of the freedom to provide services and it is the host State workers that have therefore felt the effects of discrimination. The prohibition of discrimination on grounds of nationality is a fundamental EU principle and therefore must be maintained, but not at the expense of equality. The EU is intended to benefit *all* of its citizens; not only those crossing a border.

(iii) Are there Enough Workers to Fill the Demands?

It has been established that the employment of all Union citizens must be taken into consideration; both the national workers and the posted workers. However, a very practical consideration that must not be overlooked in this context is determining whether there are, in reality, enough British workers to fill the demands of the construction industry in the UK?

The Chartered Institute of Building indicates that “77% of respondents believe a skill shortage exists in the construction industry.”³²⁴ This suggests that

³²² Interpretative Communication of the Commission, ‘on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement’ COM(2001) 566 final, Fn. 61.

³²³ Express ‘Oil refinery strikers win UK jobs fight’ 6 February 2009: <http://www.express.co.uk/news/uk/83532/Oil-refinery-strikers-win-UK-jobs-fight> [accessed 23 March 2013].

³²⁴ The Chartered Institute of Building ‘A report exploring skills in the UK Construction Industry’ May 2011:

the skills shortage identified in the UK construction industry can be filled by the opportunities presented by the Directive and as the workers are only temporary, the impact on resources in the host State should also only be a temporary issue. Therefore, the Directive does provide a much-needed service, especially in a host State experiencing a skills shortage in its domestic workforce and with the accession of twelve new Member States since 2004 the potential workforce has virtually doubled.

The skills shortage would therefore appear to be a domestic rather than a Union issue, but what is the cause? It is argued that the skills shortage in the UK can, in part, be attributed to a lack of apprenticeships undertaken nowadays.³²⁵ There is a greater focus on attending university as opposed to undertaking skilled apprenticeships once students have left school and with fewer apprenticeships the skills force in the UK may have diminished as a result. David Cameron, the UK Prime Minister, intends to change this by advocating the importance of apprenticeships insisting that they will be “at the heart of our mission to rebuild the economy”.³²⁶ In light of the above, where there is a skills shortage in the UK, the posted workers deployed to fill those positions would undertake the skilled jobs; therefore most likely earning more than the minimum wage and in no sense ‘undercutting’ national workers. Therefore, the Directive and Article 56 TFEU provide the solution to domestic problems, such as fluctuations in the national labour market. However, this does not negate the fact that the Court’s interpretation of the Directive has been executed so poorly so that only the minimum protection can be extended to the posted workers; a result that will not be welcomed by either the national or the posted workers. The only beneficiary will be the service provider as they are more likely to win a public procurement contract and the contractor in the host State as they will benefit from a more economically beneficial tender.

To conclude this section, the industrial action in the Lindsey oil refinery dispute and also in *Laval* was not an act of discrimination against the Italian and Portuguese and Latvian workers respectively, but frustration over their own rights

http://www.ciob.org.uk/sites/ciob.org.uk/files/CIOB%20Skills%20in%20the%20Construction%20Industry%202011_0.pdf [accessed 23 March 2013], p. 1.

³²⁵ Urwin, ‘Tutu maker and proud: we must learn trades’ 3 November 2011, Evening Standard.

³²⁶ BBC News ‘Apprenticeships to be “the new norm”, says David Cameron’ 11 March 2013: <http://www.bbc.co.uk/news/uk-21734560> [accessed 23 March 2013].

being relegated at a time when local unemployment was at its highest, “This is not to concede to protectionism or to oppose free movement, but to insist on fairness.”³²⁷ The text of the Directive has led to misinterpretations of its own intentions and the Court’s judgment has exaggerated the issues, “by imposing an *a priori* normative straitjacket in defining acceptable host-state standards, it fails to provide valuable space to respect normative pluralism in labour standard-setting in the Member States.”³²⁸

(iv) Interim Conclusion

The impact of the recession on local employment and the Directive should not be underestimated, Ewing said that the Lindsey dispute provides “a glimpse into a future where the toxic mix of globalisation and weak labour standards meets economic recession.”³²⁹ This issue has been heightened in the UK, in part, because the British Government did not implement any transitional controls on accession States which led to the largest peacetime migration to the UK in history, “We [the Labour Government] severely underestimated the number of people who would come here. We were dazzled by globalisation and too sanguine about its price.”³³⁰ Following the explosive EU enlargement in 2004 came the Global Recession in 2007; culminating in a genuine fear concerning the place of local labour. However, this fear was obviously not exclusive to the UK alone; the French first coined the expression and image of the threat of the “Polish Plumber” during the EU Constitution referendum. The pejorative expression of the Polish Plumber denotes the impact of social dumping from Eastern Europe. This threat of the ‘Polish invasion’ has recently been felt in the Netherlands and as a response Geert Wilders, a Dutch politician and leader of the Freedom Party, launched a website inviting Dutch nationals to make complaints about Polish, Romanian and Bulgarian workers in the Netherlands, “Wilders’ Freedom party (PVV) has already gathered thousands of denunciations since it launched a website this week,

³²⁷ The Institute of Employment Rights ‘Power to the Workers!’ 3 February 2009: <http://www.ier.org.uk/node/318> [accessed 12 April 2010].

³²⁸ Kilpatrick, ‘British Jobs for British Workers? UK Industrial Action and Free Movement of Services in EU Law’, op. cit., 28.

³²⁹ The Institute of Employment Rights ‘Power to the Workers!’ 3 February 2009: <http://www.ier.org.uk/node/318> [accessed 12 April 2010].

³³⁰ BBC News ‘Miliband shifts immigration policy, saying Labour “got it wrong”’ 22 June 2012: <http://www.bbc.co.uk/news/uk-politics-18539472> [accessed 23 March 2013].

asking Dutch citizens to report nuisance, pollution, problems related to housing or simply competition on the job market, caused by Europeans citizens coming from Poland, Romania and Bulgaria.”³³¹ This reaction is a dangerous avenue that could ultimately lead to hostility and racism. However, the response of slogans such as “British jobs for British workers”, the “Polish Plumber” and this recent Dutch website reflect an emotive response to social dumping which is a very real threat following *Laval* which brought trade union collective action within the scope of the free movement provisions and the consequent repercussions have been damaging, “National social models based on the lawfulness of collective action are overruled by the direct effect of EU law where there is a cross-border element. The implications for ‘social dumping’ are potentially dramatic.”³³²

This section explored the possibility of including local hiring clauses in public procurement contracts. It was determined that such a requirement would not be compatible with Union law because of its discriminatory effect, however, if argued carefully, there is room for social requirements in public procurement that are not limited to *local labour*, such as using ‘long-term unemployed’ workers. It is also imperative to bear in mind the opportunities that the Union presents, for example the movement of labour works both ways – British posted workers are free to find employment abroad, as supported by Article 56 TFEU and the Directive; the internal market is open to all of its citizens.

Finally, the British skills shortage outlined above can be repaired by use of the Directive. However, the Court’s interpretation of the Directive has magnified the problems by rigidly maintaining a minimum level of protection for posted workers and thereby contributing to the issue of undercutting the host State workers. Skills shortages, recession and high unemployment in the domestic labour market are timeless issues prone to fluctuations in an economy, however, the application of the Directive could assist at these times with its intentions of promoting a climate of fair competition and guaranteeing respect for workers’ rights. What is needed to get the best out of the Directive is an amendment of its

³³¹ EurActiv ‘Dutch website causes stir in Central Europe’ 10 February 2012: <http://www.euractiv.com/justice/dutch-website-causes-stir-centra-news-510729> [accessed 23 March 2013].

³³² Bercusson, ‘The Trade Union Movement and the European Union: Judgment Day’, *op. cit.*, 289.

text to tighten and clarify its objectives and therefore avoid misinterpretations and misuse by the Court.

V. Rüffert

Less than four months after *Laval*, the Second Chamber of the Court determined *Rüffert*³³³ with Judge Timmermans as the Rapporteur and Bot as the AG. The Court made its judgment on 3 April 2008 and on the same day the Commission issued a Recommendation on enhanced administrative cooperation in the context of posted workers.³³⁴ The Commission recommended three points for improvement: (i) better administrative cooperation through use of an electronic information exchange system; (ii) improved access to information for service providers and posted workers; and (iii) exchange of information and good practice among Member States via forums such as the Commission's proposition to establish a High-Level Committee in the area of posting of workers. Also on 3 April 2008 the Commission published a press release entitled, "EU calls for urgent action to improve working conditions for 1 million posted workers".³³⁵ In the article Vladimír Špidla, the EU Employment, Social Affairs and Equal Opportunities Commissioner, warned, "Member States must improve cooperation if we are to effectively protect working conditions and avoid a race towards the lowest minimum rates of pay in the EU as a whole." The article expanded on the Commission's Recommendation and identified that the apparent poor enforcement of the Directive and lack of clarity concerning the applicable terms and conditions to posted workers, as seen in the case law, was undermining the Directive's effectiveness. In light of the Commission's concerns in respect of the Directive and their proposals for improvement, the case of *Rüffert* was very timely, yet, it is submitted, only added to the problem.

(i) The Facts

³³³ *Rüffert*, op. cit.

³³⁴ Commission Recommendation on enhanced administrative cooperation in the context of the posting of workers of 31 March 2008, OJ C85/1.

³³⁵ European Commission 'EU calls for urgent action to improve working conditions for 1 million posted workers' 3 April 2008: <http://ec.europa.eu/social/main.jsp?langId=en&catId=471&newsId=188&furtherNews=yes> [accessed 17 January 2013].

The reference from the Oberlandesgericht Celle (Higher Regional Court, Germany) was on the interpretation of Article 56 TFEU. In the *Rüffert* case ‘Land Niedersachsen’ (the Land of Lower Saxony) awarded ‘Objekt und Bauregie’ a contract for the structural work in the building of Göttingen-Rosdorf prison. The contract contained a declaration regarding compliance with collective agreements under the ‘Buildings and public works’ collective agreement, specifically, paying the employees at least the minimum wage in force at the place where those services are performed. Objekt und Bauregie, of which Rüffert was liquidator, used a subcontractor established in Poland. However, the Polish workers posted to Germany to build the Göttingen-Rosdorf prison, were being paid a wage below that provided for in the Buildings and public works collective agreement. Specifically, 53 workers were paid 46.57% of the minimum wage.

The Directive was transposed into German national law by the AEntG which sets out that in Member States where there is a system for declaring collective agreements to be ‘universally applicable’ (as is the case in Germany) the collective agreement may only apply if it has been declared universally applicable. However, the Buildings and public works collective agreement in force at the site had not been declared universally applicable and the minimum rate of pay laid down in the Buildings and public works collective agreement exceeded the minimum rate of pay applicable pursuant to the AEntG. The rules on minimum rates of pay in the German construction industry are set out in a collective agreement which applies in the Federal Republic of Germany entitled the “TV Mindestlohn” and has been declared universally applicable and therefore forms part of the ‘nucleus’ of protective rules as defined by the Directive. Accordingly, in *Rüffert*, it needed to be assessed whether the Buildings and public works collective agreement, that was in force at the site where the services were performed, was applicable to the posted workers in which case the higher wage would apply to them. The national court was uncertain as to whether the requirement to comply with the collective agreement was justified by overriding reasons relating to the public interest and was necessary for the protection of workers and therefore referred the following question for a preliminary ruling: does a national law that requires contractors, and indirectly their subcontractors, on the award of public contract to expressly agree to paying posted workers at

least the remuneration provided by the applicable collective agreement breach Article 56 TFEU?

(ii) The Collective Agreement: “Universally Applicable”

An overriding issue in the case was whether the collective agreement could apply at all. Article 3(1) Directive requires collective agreements to have been declared “universally applicable”, so that they are observed by all undertakings in the “geographical area and in the profession or industry concerned”. The Buildings and public works collective agreement of Lower Saxony, “covers only a part of the construction sector falling within the geographical area of that agreement, since, first, the law which gives it such an effect applies only to public contracts and not to private contracts and, second, the collective agreement has not been declared universally applicable.”³³⁶ The Court determined that such a rate of pay in the collective agreement cannot be considered to constitute a minimum rate of pay in respect of the Directive and further, it follows that it cannot be considered as a term or condition of employment that is more favourable to the workers under Article 3(7) Directive.

As aforementioned, German law does provide a system for declaring collective agreements to be universally applicable. Accordingly, the minimum rate of pay must be assessed in line with Article 3(1) Directive and not Article 3(8) Directive which only applies to labour systems that do not provide for collective agreements to be declared universally applicable. Article 3(1) Directive provides that Member States guarantee to posted workers in the host State the minimum rate of pay as laid down “by law, regulation or administrative provision, and/or by collective agreements or arbitration awards which have been declared universally applicable”. Further, “For the purposes of this Directive, the concept of minimum rates of pay referred to in paragraph 1 (c) is defined by the national law and/or practice of the Member State to whose territory the worker is posted.” Personally, I accept that the collective agreement applicable at the work place had not been declared universally applicable and therefore had no legitimate expression for the Court to follow. Therefore, by default the collective agreement

³³⁶ Rüffert, op. cit., [29].

that is universally applicable will apply to the posted workers, in accordance with the Directive, which can easily be relied on in this public law case, and therefore provided that the posted workers are being paid in accordance with the minimum laid down by the universally applicable collective agreement it is very difficult to challenge this judgment on a legal basis. However, there is one flaw to the Court's reasoning and this was superbly argued by AG Bot in his Opinion under paragraphs 89 – 94, which has been paraphrased here: the rules on minimum rates of pay in the German construction industry are set out in the TV Mindestlohn collective agreement which has been declared universally applicable and therefore forms part of the nucleus of protective rules as defined by the Directive. The TV Mindestlohn expressly reserves the possibility of applying terms of employment that are more favourable to workers under other collective agreements or special agreements. These specific collective agreements are intended to complement the TV Mindestlohn, however, as they are normally not declared to be universally applicable they fall outside what is accepted by the Directive. The AG stated that he did not believe this discounts the application of these special, or more specific, collective agreements; since they ordinarily set higher wages than those specified by the TV Mindestlohn they constitute the implementation of enhanced national protection, "As I have previously demonstrated, such enhanced national protection is authorised under Article 3(7) of Directive 96/71."³³⁷

(iii) The More Favourable Term and Public Procurement

The Directive was extensively discussed in this case; predominantly whether the law of Lower Saxony was covered by the favourability provision under Article 3(7) Directive. The Court determined that the rate of pay in the collective agreement cannot be considered as a term of employment that is more favourable to the posted workers. The reasoning presented by the Court to justify this conclusion is very disappointing and does not provide a full explanation. Particularly in light of the ruling in *Laval* only four months previously, the Court had an opportunity to be more lenient here but avidly confirmed its position as set out in *Laval* by confirming that the minimum is the limit, "the level of protection

³³⁷ AG Opinion Rüffert, op. cit., [94].

which must be guaranteed to workers posted to the territory of the host Member State is limited”³³⁸ and further clarification of this, “What is necessary for the protection of workers is defined by the mandatory minimum wage”.³³⁹ It is evident that the Court is satisfied with viewing the minimum as a maximum.

The Commission stated that as the collective agreement only applied to public contracts and not private, the more favourable terms contained therein could not be justified by an overriding public interest objective as it does not apply to all areas of economic life.³⁴⁰ However, AG Bot disagreed with this line of argument for the following three reasons:³⁴¹ (i) the Land of Lower Saxony, as a public contractor, was acting within its competence in the field of public procurement and would have to be granted delegated powers to declare a collective agreement as universally applicable; (ii) whether the prime contractor is public or private is not relevant from the viewpoint of Union law. What is relevant to Union law is the compliance of non-discrimination on the basis of nationality, “in my view it is crucial that, in the framework of the performance of the same public contract, local workers and posted workers be paid at the same rate. It is here, to my mind, that we must apply the yardstick that will enable us to detect possible discrimination in breach of Community law.”³⁴²; and (iii) as well as having the contract fulfilled, the award of public contracts may also meet the need of fulfilling public interest requirements such as social objectives, meeting these secondary aims has been recognised in the literature, “public procurement may be a means of combating unemployment and exclusion”³⁴³ and in the legislation, “The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.”³⁴⁴

Public procurement has the potential for advancing social policies and McCrudden based the majority of his analysis of the *Rüffert* case on the Court’s complete lack of reference to the public procurement context, “Those considering the *Rüffert* case tend to see the case through the lens of the Posted Workers

³³⁸ *Rüffert*, op. cit., [34].

³³⁹ *Ibid.* [15].

³⁴⁰ AG Opinion *Rüffert*, op. cit., [55].

³⁴¹ *Ibid.*, [128 – 132].

³⁴² *Ibid.*, [131].

³⁴³ *Ibid.*, footnote 41.

³⁴⁴ Article 26, Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, [2004] OJ L 134/114.

Directive rather than as one concerned with public procurement, and that is too blinkered an approach, in my view.”³⁴⁵ AG Bot did make reference to the Procurement Directives, but this was not expressly recognised by the Court. A possible explanation of this could be, “There is evidence that some members of the Court may have misunderstood this provision of EU procurement law quite profoundly and, as a result, may not have taken the procurement context of the case seriously enough.”³⁴⁶ However, even McCrudden admits, “it is arguable that, even if the Court had been fully briefed on the procurement dimensions of the case, it would have made little difference because in any event the Court’s Article [56] analysis would have trumped the Procurement Directives and the Court would therefore have determined the issue in the same way.”³⁴⁷ I have to agree with this conclusion and further, I believe that the Court made its decision before a thorough examination of all of the issues had been carried out and therefore it had to bend its analysis to suit the final judgement. Perhaps this submission is unduly cynical but where the Court has so rigidly committed itself to the decision of prioritising the economic freedoms without fully assessing and appreciating all of the social considerations at issue, it is difficult to see it in another way. If anything, the Court’s decisions during the *Laval* Quartet have almost become stricter; from initially leaving proportionality to the national court (*Viking*) to determining the proportionality test itself (*Laval*) to the *Rüffert* case where the Court has tightened its control even further by ignoring the public procurement context, “Public procurement is an area in which Member States must be given some discretion to decide how social policies... may best be implemented.”³⁴⁸ McCrudden concludes his analysis of *Rüffert* by stating that, “The decision of the ECJ in the *Rüffert* case is *per incuriam*... In its apparent rush for consistency with the recent decisions in *Laval* and *Viking*, ignoring anything that stood in its way... it has risked undermining the coherence of the corpus of EC law relating to procurement linkages, a corpus of law that the Court itself partly constructed”.³⁴⁹

Rüffert is extremely tendentious towards the freedom to provide services. Its treatment and application of Article 3(7) Directive is unsatisfactory. This

³⁴⁵ McCrudden, ‘The *Rüffert* Case and Public Procurement’ in Cremona (Editor), *Market Integration and Public Services in the European Union* (2011) OUP, 133.

³⁴⁶ *Ibid.*, 141.

³⁴⁷ *Ibid.*, 147.

³⁴⁸ *Ibid.*

³⁴⁹ *Ibid.*, 148.

ruling leaves posted workers with no alternative other than to succumb to the less favourable wage than initially anticipated and the host State workers are even more vulnerable to the threat of posted workers offering a service at a more competitive rate.

The national court acknowledged that the obligation to comply with a collective agreement that sets a higher wage will compromise the service provider's competitive advantage which "constitutes an impediment to market access."³⁵⁰ However, it is submitted that viewing the compliance of the host State's collective agreement as an impediment to market access is a very dangerous interpretation that is the antithesis of the internal market, leading to a race to the bottom and social dumping; as pre-warned by Vladimír Špidla in the press release. AG Bot opined that Article 3(7) Directive permits Member States to improve the level of social protection to workers employed in its territory, therefore provided it is compatible with Union law, "in principle, this provision authorises the implementation of enhanced national protection."³⁵¹ However, these social interests are set against the interests of the freedom to provide services which is supported by Article 56 TFEU and is consequently very difficult to challenge in the Court, "since the Directive has its legal basis in the Treaty, any infringement of the Directive must entail infringement of the Treaty."³⁵²

(iv) Potential Justifications

The referring court and the Polish Government maintained that the measure at issue does infringe Article 56 TFEU and further it cannot be justified as the purpose of the collective agreement in place is to protect German building undertakings from competition from other Member States thereby achieving an economic purpose which, according to the Court's case law, cannot justify a restriction of a fundamental freedom.³⁵³ However, AG Bot did not view the purpose of the collective agreement as a means of protectionism, but recognised its purpose as "securing the attainment of the objectives of protecting workers and

³⁵⁰ Rüffert, op. cit., [14].

³⁵¹ AG Opinion Rüffert, op. cit., [83].

³⁵² AG Opinion C-319/06 *Commission v Luxembourg*, op. cit., [37].

³⁵³ AG Opinion Rüffert, op. cit., [51].

preventing social dumping”³⁵⁴ by providing that, “local workers and posted workers on the same site will be paid *equally* [emphasis added].”³⁵⁵ It is submitted that equal terms and conditions are the very essence of social protection and reversion of social dumping, accordingly, it is something to work towards and not to set against Article 56 TFEU as a violation. Ultimately, it is for the national court to assess the true intention of the national measure at issue which is why it was disappointing that the Court was so quick to discount the measure as a means of worker protection. In my opinion, the Court must appreciate that just because a measure has the spill-over effect of protecting national businesses it does not authorise its condemnation where its primary purpose is protecting workers and preventing social dumping by prohibiting unfair competition; if the Court take the approach of condemning all secondary protectionist measures this will create an environment where social dumping can flourish and social interests, such as worker protection, will be quashed by the economic interests of the internal market which works against the Union’s objectives as prescribed by Article 151 TFEU, “The Union and the Member States, having in mind fundamental social rights... shall have as their objectives the promotion of employment, improved living and working conditions,... proper social protection,... dialogue between management and labour... To this end the Union and the Member States shall implement measures which take account of the diverse forms of national practices”. What can be learnt from this case is that a greater appreciation of the differing Member States’ labour systems is much needed.

(v) *Concluding Rüffert*

The reaction to the Court’s judgment in *Rüffert* emphasised the prior criticisms of *Viking* and *Laval*.³⁵⁶ The judgment also influenced the political scene in the EU as it was used as part of the ‘no’ campaign in Ireland’s referendum on the ratification of the Lisbon Treaty; the Technical, Engineering and Electrical Union (an Irish trade union) stated that these recent judgments (*Viking*, *Laval* and now *Rüffert*), “show that the pendulum has swung against workers’ rights and in favour of big

³⁵⁴ Ibid., [114].

³⁵⁵ Ibid., [119].

³⁵⁶ McCrudden, ‘The *Rüffert* Case and Public Procurement’, op. cit., 130.

business.”³⁵⁷ The Court’s decision was not an obvious one as the following entities all disagreed with the ruling: AG Bot, Land Niedersachsen, the German, Danish, Irish, Cypriot, Austrian, Finnish and Norwegian Governments all stated that Article 56 TFEU does not preclude a national measure such as the one at issue in the main proceedings.³⁵⁸ AG Bot held that the measure at issue is an indistinctly applicable measure that restricts Article 56 TFEU, yet, in so far as the measure does restrict the freedom to provide services, it is justified by the objective of worker protection and it is proportionate in achieving that objective.³⁵⁹ Further, it was also assessed by some of the aforementioned Governments³⁶⁰ and the AG³⁶¹ that the Directive also does not preclude a national measure such as the one at issue in the main proceedings.

It has been stated that the heavy reliance on the Directive in *Rüffert* implied that, “The answer turns on what is thought to be the rationale for the Directive, a matter which has always been unclear.”³⁶² Davies suggested that there are “at least three, largely inconsistent, rationales for the Directive... promotion of cross-border services (suggested by the Directive’s Treaty bases), protecting posted workers and protecting host state workers (both mentioned in the Directive’s recitals).”³⁶³ These three inconsistent rationales have the potential to result in differing and inconsistent interpretations of the Directive, however, it is submitted that *Rüffert* made the rationale very clear; the legal basis of the Directive comprises Articles 53(1) and 62 TFEU which binds the Directive to the freedom to provide services as opposed to clarifying the legislation as a measure of employee protection. In *Rüffert* the Court clarified the rationale of the Directive as being inextricably linked to this freedom, “That interpretation of Directive 96/71 is confirmed by reading it in the light of [Article 56 TFEU], since that directive seeks in particular to bring about the freedom to provide services”.³⁶⁴

³⁵⁷ European Industrial Relations Observatory On-line ‘Employers back “yes” vote but unions divided on Lisbon Treaty’ 8 September 2008: <http://www.eurofound.europa.eu/eiro/2008/07/articles/ie0807049i.htm> [accessed 25 January 2013].

³⁵⁸ AG Opinion *Rüffert*, op. cit., [47].

³⁵⁹ Ibid.

³⁶⁰ Ibid., [49].

³⁶¹ Ibid., [66].

³⁶² Davies, ‘Case C-346/06, *Rüffert v Land Niedersachsen* [2008] IRLR 467 (ECJ)’, op. cit., 293.

³⁶³ Ibid., 295.

³⁶⁴ *Rüffert*, op. cit., [36].

Thus, it is submitted that one of the main issues with the case, as also exemplified in *Laval*, is the legal basis of the Directive.

It is submitted that the second fundamental issue in the case is that the applicability of collective agreements has been meticulously scrutinised by the Court and it would appear that if they are not universally or generally applicable in the geographical area then they may be discounted. Further, what this case also shows is that if there is some form of sectoral minimum wage in the host State, collective agreements can be more easily relegated. Article 3(1) Directive specifies that the minimum rate of pay is defined by the host State. The German practice for setting out a minimum rate of pay in the construction industry is initially provided for in the universally applicable TV Mindestlohn collective agreement, however as aforementioned, this agreement expressly reserves the possibility of applying terms of employment that are more favourable to workers under other collective agreements or special agreements, these special agreements, that are not universally applicable, are intended to complement the TV Mindestlohn. Therefore, an argument that could have been submitted to the Court is that in respect of the German practice, these special arrangements garner some indirect universal applicability via the TV Mindestlohn collective agreement. However, this argument would most likely not have been accepted due to the Court's stringent interpretation of the Directive, "To safely fit inside the Court's interpretation of what counts as a 'minimum' would require a genuinely radical restructuring of collective bargaining in Member States."³⁶⁵

Rüffert has revealed a systemic problem in respect of the Court's interpretation of the Directive; the Court has, without apparent guidance from the text, rigidly fixated its decisions to the 'minimum' provided by the Directive even where a potentially more favourable term may exist. As discussed in Chapter 1, the creation of the Directive was inspired by *Rush Portuguesa* which specified, "Community law does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established".³⁶⁶ The Directive added the

³⁶⁵ Kilpatrick, 'Laval's regulatory conundrum: collective standard-setting and the Court's new approach to posted workers' (2009) EL Rev, 34(6): 844-865, 853.

³⁶⁶ *Rush Portuguesa*, op. cit., [18].

minimum requirement and the universal applicability of collective labour agreements, which the Court has interpreted as a maximum and has added the requirement that where not universally applicable, collective agreements must be declared as applying in the implementing legislation.

In essence, the national court's question may also be read as: if service providers must expressly agree to pay posted workers in accordance with the going rate at the place where the service is performed, does that restrict Article 56 TFEU? As the Court answered 'yes' this shows a real step back for the Court, in spite of the Commission's publications on the day of judgment. The preliminary question asked whether the service providers may agree to pay "at least" the remuneration prescribed by the collective agreement in line with the "minimum wage" in force where the services take place. The fact that the service provider was only requested to pay in line with the *minimum* in practice at the site and no more and it was still held to restrict the freedom to provide services and breach the Treaty reveals that the Court was satisfied with its interpretation of the Directive in *Laval* in prioritising the interests of the internal market and have continued in the same line. The Court was able to justify this as ultimately there was no legitimate expression for the applicable collective agreement. Therefore, a greater acceptance of collective agreements and in turn differing Member States' labour systems is what needs to be revised regarding the Directive.

So, what is to be done? Either all Member States must accept that only collective agreements that have been labelled "universally applicable" will carry weight in the Court and therefore they must adapt their labour systems accordingly, or alternatively, and in my opinion more realistically, the Directive must be revised to not only adapt its legal basis so that the Court is not as tied to the freedom to provide services but also to make room for, and accept, a broader scope of collective agreements. Currently ten of the Member States do not have a statutory minimum wage and it is imperative that the Union shows a greater acceptance and tolerance of the alternative forms of laying down terms and conditions of employment in the Member States.

VI. *Commission v Luxembourg*

Two months after *Rüffert*, the Court determined *Commission v Luxembourg*;³⁶⁷ the final case in the *Laval* Quartet, “Just when it looked like things could not get much worse for trade unions in the ‘old’ Member States following the European Court of Justice’s decisions in *Viking*, *Laval* and *Rüffert* along comes the Court’s decision in *Commission v Luxembourg*... This will particularly benefit businesses from the ‘new’ Member States, even if this comes at the expense of labour laws in the host old Member States.”³⁶⁸

(i) *The Facts*

Commission v Luxembourg was decided on 19 June 2008 in the First Chamber with Judge Levits as the Rapporteur and Trstenjak as the AG. The Commission brought this action against the Grand Duchy of Luxembourg concerning their national Law of 20 December 2002 that transposed the Directive. The Commission claimed that the following four points were likely to be incompatible with Union law and therefore Luxembourg had failed to fulfil its obligations under Article 3(1) and (10) Directive and Articles 56 and 57 TFEU: (i) the national law required undertakings established in another Member State which posts its workers to Luxembourg to comply with terms and conditions of employment going beyond the requirements of Article 3(1) and (10) Directive, which included the following: (a) requirement of a written contract of employment or a corresponding document within the meaning of Directive 91/533; (b) automatic adjustment of rates of pay to reflect changes in the cost of living; (c) compliance with rules on part-time and fixed-term work; and (d) compliance with collective labour agreements; (ii) Article 3(1)(a) Directive was incompletely transposed; given the failure to ensure that posted workers are granted any other rest period apart from the weekly rest period, by excluding daily rest periods and rest breaks; (iii) the basic information necessary for monitoring purposes lacked the necessary clarity to ensure legal certainty for service providers; and (iv) the freedom to provide services was restricted by requiring

³⁶⁷ C-319/06 *Commission v Luxembourg*, op. cit.

³⁶⁸ Barnard, ‘The UK and Posted Workers: The Effect of *Commission v Luxembourg* on the Territorial Application of British Labour Law’ (2009) ILJ, 38, 122.

undertakings established in other Member States to keep documents with an ad hoc agent resident in Luxembourg.

Luxembourg replied to these complaints by conceding point (ii) concerning rest periods and accordingly amending the national law, but Luxembourg defended points (i), (iii) and (iv). Luxembourg stated that the subject of complaint in respect of point (i) constituted public policy provisions as provided for by Article 3(10) Directive; in respect of point (iii) on monitoring information, Luxembourg stated that the national law did not require prior notification; and in respect of point (iv) on keeping documents with an ad hoc agent, Luxembourg stated that it was a non-discriminatory requirement that enabled the authority to carry out better checks. Bearing in mind that the Commission issued a Recommendation on enhanced administrative cooperation in the context of posted workers³⁶⁹ that advocated better administrative cooperation, improved access to information and exchange of information and good practice among Member States just two months prior, it is surprising that its action against Luxembourg was challenged on the very basis of what it was advocating.

The Court held that Luxembourg was unsuccessful on all four points. Luxembourg failed to fulfil its obligations under Article 3(1) and (10) Directive and Articles 56 and 57 TFEU for the following reasons: for point (i) requiring service providers to comply with terms beyond those specified in Article 3(1) and (10) Directive may only be permitted on grounds of public policy provisions and in this case, there was no defence of public policy. The Court held that the public policy exception is a derogation from the fundamental freedom to provide services and therefore must be interpreted strictly, the scope of which cannot be determined unilaterally by a Member State, “It follows that public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society.”³⁷⁰ Luxembourg conceded to point (ii) which was well-founded. Point (iii) raised the issue of the lack of clarity on basic information for monitoring purposes as the notification procedure requested under the Luxembourg legislation was held as being ambiguous and this ambiguity is likely to dissuade undertakings wishing to post their workers to Luxembourg thereby

³⁶⁹ Commission Recommendation on enhanced administrative cooperation in the context of the posting of workers of 31 March 2008, OJ C85/1.

³⁷⁰ C-319/06 *Commission v Luxembourg*, op. cit., [50].

hindering the freedom to provide services. Finally, it was held that the obligation imposed under point (iv) would have involved an additional administrative and financial burden for undertakings established elsewhere thereby dissuading them from providing services in Luxembourg. The Court suggested that a posted worker could take on the task of ensuring the necessary documents for monitoring were made available to the competent national authorities which would be a less restrictive measure to meet the same objective. Also, the retention of documents in the host State after the period of posting has ended was rendered superfluous by *Arblade and Leloup*³⁷¹ and Article 4 Directive.

(ii) The Advocate General's Opinion

AG Trstenjak also opined that Luxembourg had failed to fulfil its obligations under Article 3(1) and (10) Directive and Articles 56 and 57 TFEU. However, there was one minor point in which the AG held that the Commission's complaint was unfounded, whereas the Court disagreed. This was in respect of Point (2) of Article 1(1) of the Law of 20 December 2002 concerning the automatic adjustment of pay in accordance with developments in the cost of living. Luxembourg argued that the provision aimed to protect employees and contributed to ensuring good labour relations in the host State. The Commission argued that the adjustment of pay refers to both actual wages and the minimum rate of pay, however, as Article 3(1)(c) Directive only refers to the "minimum rates of pay" it does not conform to the Directive. Whereas, AG Trstenjak stated that the provision is "neither ambiguous nor does it allow for an interpretation which is contrary to Community law... [and its objective is] that a general adjustment of pay is effected in line with developments in the cost of living which also operates to the benefit of the minimum wage".³⁷² The Court held that Luxembourg "merely cited in a general manner the objectives of protecting the purchasing power of workers and good labour relations, without adducing any evidence to enable the necessity for and proportionality of the measures adopted to be evaluated."³⁷³ In my opinion, this confirms that, as the legislation stands at

³⁷¹ *Arblade and Leloup*, op. cit.

³⁷² AG Opinion C-319/06 *Commission v Luxembourg*, op. cit., [54].

³⁷³ C-319/06 *Commission v Luxembourg*, op. cit., [53].

present, posted workers are not legible to more than the minimum rate of pay; however, I do not submit that that is the wrong conclusion, after all, it is the rate that the host State has set as an appropriate wage for its own citizens. The difficulty is that the Court's interpretation of the Directive is resolutely fixed on the very minimum; even where national law provides for fluctuations in the minimum rate this is deemed as beyond the parameters of the Directive. The *Laval* Triplet has unequivocally verified that if the Court's interpretation is to change, the legislation must change.

(iii) *Concluding Commission v Luxembourg*

The irony of *Commission v Luxembourg* is that the infringement action has been brought with the intention of clarifying the provisions of the Directive and therefore ensuring its proper implementation. However, the effect of the decision appears instead to render certain provisions obsolete, "The effect of *Commission v Luxembourg* is to interpret Article 3(10) PWD and Article 7(2)/Article 9(2) of the Rome Convention/Regulation almost out of existence."³⁷⁴ The Court construed public policy provisions under Article 3(10) Directive so tightly, that it would appear unless the national measure is intended to eliminate forced labour or child labour the provision will not be deemed serious enough to qualify as a genuine and sufficiently serious threat to a fundamental interest of society. However, this is contrary to the Commission's Communication on the implementation of Article 3(10) Directive:

"Finally, the group of experts which prepared the transposal of the Directive considered that the concept of "public policy provisions" referred to in Article 3(10) covers provisions concerning fundamental rights and freedoms as laid down by the law of the Member State concerned and/or by international law, such as freedom of association and collective bargaining, prohibition of forced labour, the principle of non-discrimination and

³⁷⁴ Barnard, 'The UK and Posted Workers: The Effect of *Commission v Luxembourg* on the Territorial Application of British Labour Law', op. cit., 129.

elimination of exploitative forms of child labour³⁷⁵, data protection and the right to privacy.”³⁷⁶

The Commission therefore concluded that freedom of association and collective bargaining come within the public policy provisions of Article 3(10) Directive, yet the Court has not granted them due recognition. Further to this, it is submitted that the effects of enforcing minimum standards when more favourable terms are available contributes to lowering social standards leading to social dumping which is a genuine and sufficiently serious threat to the fundamental interests of society, and the protection of labour and support of collective bargaining are fundamental social rights.

This lack of recognition is accountable to the fact that the Directive is a dichotomy of social and economic factors; the legislation is based upon the freedom to provide services, yet this economic freedom directly relies upon posted workers to provide those services. Therefore, the rights and protection of the workers will inevitably come under the Directive’s immediate concern. It is therefore surprising that the social interests of the workers have been so blatantly relegated by the economic freedoms. The Court has also relegated the national interests below those of the EU by dismissing the differing labour systems, as influenced by the differing sociological traditions of the Member States. The Member States’ labour systems are so varied and layered in nuances reflecting the nation’s culture and sociology that the Directive, rather than being malleable and stretched to cater for the different regimes in some form of semi-harmonisation, is used by the Court in a rigid and unsophisticated manner by boiling down every interpretation to its legal basis – the fundamental freedom to provide services. The Court has magnified the problems, yet, it is submitted, it does not have the legitimacy to fix it.

VII. Abuse of the Directive

³⁷⁵ The right to organise and collective bargaining are dealt with in ILO Conventions 87 and 98. Conventions 29 and 105 cover the prohibition of forced labour, while Convention 111 establishes the principle of non-discrimination. Convention 182 covers the worst forms of child labour.

³⁷⁶ Commission Communication COM(2003) 458 final, op. cit., Section 4.1.2.2.

The final issue to be discussed in this Chapter, in respect of the relevant issues, concerns the abuse of the Directive. Misuse and misinterpretation of the Directive have been highlighted in the case law, however this section will focus on the intentional abuse of the Directive in order to circumvent national laws.

(i) Lack of Data on Posted Workers

Arguably, one of the key factors that has contributed to the abuse of this legislation specifically, is that there is a definite lack of data and information available on posted workers, “There are no precise figures or estimates of posted workers in the EU.”³⁷⁷ There is no formal requirement of registering posted workers in the host State as the obligation to declare the posting was held as being an unjustified restriction on the freedom to provide services.³⁷⁸ Accordingly, “The only available data source at EU level is based on the systematic data collection of E101 certificates (2005-2009) in the field of social security”.³⁷⁹ However, this form of data collection has several limitations, “It measures the number of postings, not the number of posted persons (the same person can be posted several times). Furthermore, the E101 social security form is not issued to all posted workers, either because it is not required (postings of over 12 months are not considered for social security purposes) or because some countries do not apply E101 forms when workers are posted, especially in the cases of very short-term postings.”³⁸⁰ In the interests of effective monitoring, it is suggested that the use of declaring postings would be proportionate to ensure compliance with the Directive.

Article 4 Directive regulates cooperation on information and as such provides that Member States shall designate a liaison office for the purpose of implementing the Directive, however, difficulties have arisen in practice, “The report of the European Federation of Building and Woodworkers and the European Construction Industry Federation is very critical on the subject of

³⁷⁷ Commission Communication COM(2007) 304 final, op. cit., Section 1.

³⁷⁸ C-490/04 *Commission v Germany*, op. cit.

³⁷⁹ Proposed Enforcement Directive COM(2012) 131 final, op. cit., Section 1.

³⁸⁰ Commission Staff Working Document, ‘Impact Assessment: Revision of the legislative framework on the posting of workers in the context of provision of services’ SWD(2012) 63 final, Section 3.1.1. Note this should be considered in the context of the reformed Regulation 883/2004 on social security, yet it is illustrative to reflect on the issues identified in the Staff Working Document.

administrative cooperation, claiming that staff numbers are often inadequate, that very few requests for information are made, and that the liaison offices and monitoring authorities often fail to provide answers at all, or else provide only vague answers.”³⁸¹ It is argued that these “vague answers” can be attributed to a general lack of certainty surrounding the Directive. The Member States must clearly present the terms and conditions available and the Union must show a greater respect of the varying ways in which this is done in accordance with the differing labour systems. The current lack of data and precision on what is to be applied allow for a greater circumvention of what the rules intended and clearly access to information and administrative cooperation must improve. This issue is magnified by the fact that posted workers are temporary, yet there is no definition of what “temporary” constitutes. Unfortunately, this has created an environment in which “fake postings” can exist, particularly seen in the form of letter-box companies.

(ii) Letter-Box Companies

Letter-box companies are created in order to tactfully avoid complying with all of the host State’s rules and regulations. As an example, an undertaking, which carries out its usual work in the host State will set up a subsidiary in the home State for the sole purpose of employing cheaper labour in the home State to post to the more expensive host State and pay them the minimum rate as opposed to the going rate which is lawful, in accordance with the Directive. The undertaking does not engage in genuine business in the home State, but manipulates the Directive and the objectives of the internal market to its advantage by exploiting the opportunities of the internal market and consequently contributing to the problems associated with the Directive by distorting competition from the inside. The posting of workers has been likened to a “Trojan horse”³⁸² and these “fake postings” which push the limits of the freedom to provide services beyond what is legitimate lead to immigration problems, social dumping and an abuse of the law.

³⁸¹ Commission Staff Working Document, ‘Commission’s services report on the implementation of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services’ SEC(2006) 439, Section 5.2.2.

³⁸² De Vos, ‘Free movement of workers, free movement of services and the posted workers directive: a Bermuda triangle for national labour standards?’ (2006) *Era Forum*, Academy of European Law, 7(3): 356-370, 370.

In order to combat the fraudulent or improper use of the freedom to provide services and the Directive, the European social partners in the construction sector (the FIEC and the EFBWW) suggested that the condition under Article 1(3) Directive of a genuine employment relationship between the service provider and the posted workers during the posting should be set out explicitly in the national legislation transposing the Directive.³⁸³ Similarly, in the case of *Plum*, it was held that there must be a genuine link between the undertaking making the posting and the home State; the service provider “must normally carry on its activities in the [home] State, that is to say, it must habitually carry on significant activities there.”³⁸⁴

(iii) Circumventing National Law

The issue of abuse of the Directive will now be explored through the case of *Rising Sun*³⁸⁵ in which third country nationals were posted from Ireland to the UK under the pretext of being “posted workers” in accordance with EU law. The case was decided by the EWHC and even though Union law was discussed at length, it was determined by the national judge that it was not necessary to make a reference to the ECJ as the decision of the judge was so clear. The Claimants attempted to rely on Union law, specifically, the Directive and the freedom to provide services under Article 56 TFEU so as to circumvent national law, specifically, UK immigration law. It was held by His Honour Judge (HHJ) Pearl that such a reliance on Union law is abusive.

The facts of the case are as follows: Ms Low, Ms Leong and Ms Yang, all third country nationals (Malaysian and Chinese respectively), were employed by ‘Rising Sun’, a catering company established in Ireland that provided catering services and staff in the European Union. In this case, they agreed an eighteen month contract with ‘Malaysian Delights Restaurant’ in the UK and the three employees were sent to the UK as posted workers, however, they did not have valid legal status in the UK. Rising Sun intended to rely on Article 56 TFEU and

³⁸³ Commission Staff Working Document SEC(2006) 439, op. cit., Section 4.2.1.

³⁸⁴ *Plum*, op. cit., [21].

³⁸⁵ *The Queen on the application of Ms Lee Ling Low, Ms Moy Yen Leong, Ms Yu Ting Yang, Rising Sun Catering Services Company Limited and Hot Hot Grill and Bar Limited trading as Malaysian Delights Restaurant v Secretary of State for the Home Department* [2009] EWHC 35 (Admin).

the Directive in order to circumvent the UK immigration law. It was held that Rising Sun could not rely on Union law because the posted workers were not EU nationals nor were they legally resident in the home State from where they had been posted. In order to rely on the Directive successfully, the posted workers, in accordance with Article 2(1) Directive, had to carry out their posting in a Member State other than the State in which they “normally work”. However, “None of the first three claimants normally works in the Republic of Ireland. They normally work, on the evidence in this case, illegally in the UK.”³⁸⁶

Abuse of rights was discussed in *Rising Sun* in light of the posted workers relying on the Directive and Article 56 TFEU to justify non-compliance with the obligations under UK immigration law. The notion of abuse of rights denotes a “purely artificial nature”³⁸⁷ by which Union law is relied upon, implicating that there is no genuine substance, or true connection to the case, with Union law. This concept of artificially relying on Union law for an ulterior purpose applies acutely to *Rising Sun*. For posted workers to be legitimately deployed under Union law they must be lawfully and habitually established in the home State to permit their posting to a host State, however, the Malaysian and Chinese posted workers were never lawfully resident in Ireland therefore their posting to the UK could not be protected by Article 56 TFEU, in accordance with the premise that, “Community law cannot be relied on for abusive or fraudulent ends.”³⁸⁸ HHJ Pearl consequently concluded that, “the Irish company’s reliance on [Article 56 TFEU] is abusive.”³⁸⁹ The attempted use of the Directive in this manner reveals its potential to circumvent national law contributing to immigration problems and emphasising the need for more definite rules on the scope of the Directive’s application.

(iv) *Interim Conclusion*

The issues highlighted above reveal how the Directive can be manipulated to circumvent national immigration laws, and this combined with the temporary

³⁸⁶ Ibid., [51].

³⁸⁷ Case C-255/02 *Halifax plc v Commissioners of Customs and Excise* [2006] ECR I-1609, para. 81.

³⁸⁸ *Rising Sun*, op. cit., [70].

³⁸⁹ Ibid., [74].

nature of posted workers and the lack of data available all contribute to a climate that is potentially damaging to immigration. In the context of posting third country nationals, it is for the Member States to take responsibility and monitor the situation by checking whether a service provider is manipulating Article 56 TFEU for an ulterior purpose, such as deploying their workers for the purpose of placing them on the host State's national employment market.³⁹⁰ Checks can therefore provide the assurance that workers who are nationals of non-Member States are posted lawfully.

It is suggested that the only way to prevent abuse of the Directive is through greater clarity of the provisions of the Directive and improved access to information concerning the applicable terms and conditions of employment. Where there is greater certainty there will inevitably be a greater opportunity for all relevant parties to be able to fulfil what is expected of them. This is particularly true when the abuse of the law can take many different forms, from letter-box companies and misuse of third country nationals, as discussed above, to companies circumventing certain administrative requirements such as re-registering their company every year to take advantage of the perks of being a newly-founded company.³⁹¹ Abuse of the law will potentially be a timeless issue, but it is submitted that where there is a genuine employment relationship between the service provider and the posted workers and the service provider is genuinely established in the home State, the Directive will be able to function as intended.

VIII. Conclusion

(i) Chapter Summary

This Chapter has identified the fundamental issues of the Directive through analysing the case law. The case law, including the cases mentioned in Chapter 1 Part 2, can be grouped into three parts consisting of the first case law following the Directive's adoption in which the Court revealed a reluctance to fully invoke the provisions of the Directive, showing that its initial impact was not

³⁹⁰ Case C-445/03 *Commission v Luxembourg* [2004] ECR I-10191, [39].

³⁹¹ Cremers, *In search of cheap labour in Europe: Working and living conditions of posted workers*, op. cit., 153.

overwhelming. Secondly, the early case law invoking the Directive proved more successful as the Court satisfactorily upheld all parts of the Directive's objectives and then finally, there was an axiomatic shift in the Court's interpretation of the Directive that can first be noticed in *Commission v Germany*³⁹² and was solidified by the *Laval* Triplet. The purpose of grouping the cases chronologically therefore charts the changing interpretation of the Court.

Kilpatrick similarly recognised this change in the Court's attitude and grouped the cases into the following three stages:

- (1) Approach 1: Strong worker protection;
- (2) Approach 2: Diluting worker protection by lowering the Article 56 TFEU ceiling;
- (3) The New Approach: Making the Directive an exhaustive and restrictively interpreted statement of justification for host-State labour law application under Article 56 TFEU.³⁹³

Kilpatrick's first approach is most likened to my second grouping (the early case law invoking the Directive) as it is signalled by the "low level of scrutiny of host-state labour laws under both the PWD and Article [56 TFEU] which is the hallmark of this approach."³⁹⁴ Kilpatrick cited *Wolff & Müller*³⁹⁵ to exemplify this approach, which seems very fitting. Kilpatrick's second approach is defined as follows, "This more demanding proportionality analysis under Article [56 TFEU] is the key feature of the second approach to posted workers. It means that host-state worker protection rules will have to much more convincingly demonstrate their added value to home-state rules in order to be allowed under Article [56 TFEU]."³⁹⁶ Kilpatrick cited *Mazzoleni*³⁹⁷ to exemplify the second approach. However, *Mazzoleni* was ruled in 2001, three years prior to *Wolff & Müller*, and the security officers in the case were not viewed as "posted workers" per se, it is therefore not a faultless analogy. Further, it is submitted that the chronological

³⁹² C-490/04 *Commission v Germany*, op. cit.

³⁹³ Kilpatrick, 'British Jobs for British Workers? UK Industrial Action and Free Movement of Services in EU Law', op. cit.; Kilpatrick, 'The ECJ and Labour Law: A 2008 Retrospective' (2009) ILJ, 38(2): 180-208.

³⁹⁴ Kilpatrick, 'The ECJ and Labour Law: A 2008 Retrospective', op. cit., 198.

³⁹⁵ *Wolff & Müller*, op. cit.

³⁹⁶ Kilpatrick, 'The ECJ and Labour Law: A 2008 Retrospective', op. cit., 199.

³⁹⁷ *Mazzoleni*, op. cit.

presentation of the case law is a truer depiction of the changing approach of the Court. The case used to demonstrate Kilpatrick's third approach is very clear, "*Laval* signalled the Court's U-turn towards this new approach... The outcome is that posted workers are permitted to receive very little host-state protection, especially on the critical issue of pay."³⁹⁸ Kilpatrick has described this "new approach" as "emasculating"³⁹⁹ the differing Member States' labour systems, revealing a distinct "lack of respect for collective standards",⁴⁰⁰ an assessment that this thesis upholds. Ultimately, the changes centre around *Laval* and the treatment of cases can be separated into pre- and post-*Laval*, hence why the majority of this Chapter has focused on that particular case.

(ii) Laval Triplet and the "New Approach"

The Court's "new approach" confirmed the application of collective agreements, the favourability provision and the public policy provision therefore, it was only until these cases were determined that it could be revealed the majority of Member States had seemingly wrongly implemented these provisions, "it is only after *Laval* that it became clear that Member States had to explicitly 'opt-in' to relying on collective agreements to set minimum standards for construction workers."⁴⁰¹ However, it is submitted that the second limb of Article 3(8) Directive was complied with as the Swedish collective agreement for the building sector was entered into between Byggnads, the central organisation representing building workers, and Sveriges Bygginindustrier, the central organisation for employers in the construction sector. In determining that the applicability of collective agreements must have been declared in the implementing legislation the Court either followed guidance from the Commission's non-binding Communication or from the out-dated amended Proposal; either way, the decision was *ultra vires*. Interestingly, this issue has not been well-documented in the existing literature on the Court's interpretation of the Directive; it would appear that this point has been accepted as correct, indeed, at first I found these cases

³⁹⁸ Kilpatrick, 'The ECJ and Labour Law: A 2008 Retrospective', op. cit., 199.

³⁹⁹ Kilpatrick, 'Laval's regulatory conundrum: collective standard-setting and the Court's new approach to posted workers', op. cit., 845.

⁴⁰⁰ Ibid., 856.

⁴⁰¹ Kilpatrick, 'British Jobs for British Workers? UK Industrial Action and Free Movement of Services in EU Law', op. cit., 15.

difficult to fault on a legal basis, in spite of their social controversies. However, I realised the fault of the Court once I had carefully re-read and compared the amended Proposal and the final version of the Directive. It occurred to me that the Court's determination that the Member States should have declared the collective agreements' applicability in the implementing legislation was an unfounded assumption and consequently should not have been automatically accepted as being self-evident. The effect of this conclusion is that if the Court had not made this mistake the outcome of *Laval* could have been different as the case hinges on the applicability of the Swedish collective agreement. The Court ruled that the collective agreement was not applicable as the "Member State has not made use of the possibility provided for in the second subparagraph of Article 3(8) of that directive."⁴⁰² This thesis intends to provide proof in the comparison drawn between the text of the amended Proposal and the Directive for the purpose of suggesting the very real possibility that the Court was not correct in reaching its conclusion.

The 2003 Commission Communication even acknowledged that none of the Member States' transposing legislation had made any mention of this option and rather than assuming the fault lay with the uncertain text of the Directive, the Commission concluded, "In these countries, therefore, only the terms and conditions of employment laid down in legislative provisions apply to workers posted on their territory."⁴⁰³ This very unforgiving approach is echoed in the Court and has been attributed to a "fear of collective standards"⁴⁰⁴ which may stem from a fear of protectionism, "we can see that same fear—protection of national undertakings from foreign competition—runs like a red line throughout the regulation of posted workers."⁴⁰⁵ National protectionism is the very antithesis of the proper functioning of the internal market. However, what the *Laval* Triplet reveals is that the prohibition of any form of protectionism, at any cost, will have a spill-over effect of diminishing social rights.

The text of Article 3(7) Directive was also only fully explained through the case law. The Article states that, "[Article 3 Directive] Paragraphs 1 to 6 shall

⁴⁰² *Laval*, op. cit., [67].

⁴⁰³ Commission Communication COM(2003) 458 final, op. cit., Section 4.1.2.1.

⁴⁰⁴ Kilpatrick, 'Laval's regulatory conundrum: collective standard-setting and the Court's new approach to posted workers', op. cit., 862.

⁴⁰⁵ *Ibid.*, 863.

not prevent application of terms and conditions of employment which are more favourable to workers.” From this it could reasonably be understood that more favourable terms for workers shall not be prevented. However, it was only in the cases cited above that specified that interpretation is not correct. The Court confirmed that the favourability provision only applies in two instances: (i) the more favourable terms of the home State that already apply to the posted workers; or (ii) the home State employer voluntarily agrees to the more favourable terms in the host State.

The Directive extends certain terms and conditions of employment of the host State to posted workers. This essentially obliges the service provider to comply with two sets of laws and therefore the concept of the Directive itself could be seen as a restriction to provide services. Consequently, in order to reduce the burden on the service provider as far as possible in this context, the Court has interpreted the Directive as far as possible in the service provider’s favour. Evidently, the Directive has revealed ambiguities and uncertainties, which have been exaggerated by the Court’s (mis)interpretation of the relevant legislation. Accordingly, the issues that have been raised and examined in this Chapter intend to be resolved in the following Chapter; thereby reaching the primary purpose of this PhD in providing solutions to the problems presented by the Posted Workers Directive.

Chapter 3: The Proposed Solutions to the Directive

I. Introduction

The ultimate purpose of this Chapter – and that of the PhD – is to provide the most suitable, practical and effective solutions to the Directive's issues that have been identified in Chapter 2. It was imperative to explicitly detail all of the issues stemming from the Directive so as to prove that there is a real problem with the legislation; it would be futile to resolve problems that we as academics have created in theory or to only reveal potential problems foreseen by the Institutions. In conclusion of Chapter 2, it was substantively proved that the problems associated with the Directive are not artificial and judging by the length of the Chapter, neither are they limited.

The findings of Chapter 2 confirm that the Court exacerbated the issues, yet the primary cause stems from the Directive itself which is open to varieties of legitimate interpretation and, at times, misinterpretation, for example in respect of the Court's requirement that Member States should have declared the collective agreements' applicability in the implementing legislation.⁴⁰⁶ Accordingly, this thesis advocates amending the text of the Directive in order to close the loopholes and clarify the uncertainties. This Chapter, which presents three proposed solutions, will therefore begin with the favoured option: (i) amend the Directive, as amending the legislation grants the possibility to directly address the identified issues. However, alternative solutions should not be discounted at this stage, for example, significant developments have been undertaken in the political institutions of the Union since the *Laval Triplet*,⁴⁰⁷ culminating in the Commission's proposed Enforcement Directive of 2012,⁴⁰⁸ which will be thoroughly reviewed and formulates the second proposed solution: (ii) adopt the Enforcement Directive. The final proposed solution entitled (iii) no changes to the Directive, details the significance of the legislative changes that have been made to the Union legal order since the *Laval Triplet*; Article 6 TEU substantially bolsters the significance of fundamental rights in the Union by granting legally

⁴⁰⁶ *Laval*, op. cit., [67].

⁴⁰⁷ *Laval*; *Rüffert*; C-319/06 *Commission v Luxembourg*, op. cit.

⁴⁰⁸ Proposed Enforcement Directive COM(2012) 131 final, op. cit.

binding status to the Charter and vows to accede to the ECHR. This proposed solution therefore considers both the Court's rulings in posted worker cases since the *Laval* Triplet and also judgments of the ECtHR in the context of collective action and bargaining in order to monitor how far the Lisbon Treaty and its impact has resolved the issues and accordingly whether amending the Directive is no longer necessitated.

The format of this chapter uses those three broad solutions as the main headings and all of the associated solutions will be assessed therein. This Chapter is predominantly inspired by my own ideas and solutions, which will be interspersed by the suggested solutions from the European social partners – especially the ETUC, the EU Institutions – especially the Commission, the Parliament and an analysis of the Court's potentially changing interpretation of the case law in light of the legislative changes. Finally, this Chapter includes a literature review that highlights where my own suggestions are either corroborated or challenged by the solutions offered in the academic doctrine. It is to be acknowledged from the outset that this Chapter has the luxury of being free from the practical constraints of being beholden to finding results for an EU Institution or delivering the answer that a client is looking for. Accordingly, the solutions presented in this Chapter will be bold and will have no alternative agenda other than to directly respond to the research results established in Chapter 2.

II. Solution Number One: Amend the Directive

It is suggested that the current text of the Directive is capable of producing satisfactory results in respect of the regulation it provides for posted workers. For example, the following areas are all already provided for: the right to undertake collective action;⁴⁰⁹ extending both the law and the collective agreements of the host State to posted workers;⁴¹⁰ universally applicable collective agreements may be extended to posted workers and where there is no system for declaring universal applicability, there are other means of applying the collective agreements which the Directive has left open to the Member States;⁴¹¹ and more

⁴⁰⁹ Directive, Preamble, op. cit., [22].

⁴¹⁰ Ibid., [12].

⁴¹¹ Ibid., Article 3(8).

favourable terms and conditions are available.⁴¹² Therefore, all of the solutions are already provided for in the text of the original Directive; yet there must be something fundamentally wrong as the Directive was interpreted so strictly by the Court, implicating that all of the Member States had transposed the Directive incorrectly. For the Court to change its interpretation now would require an inadvertent admission that its previous rulings were incorrect, which is very unlikely. Therefore, the text of the Directive has to be tightened to remove all of the uncertainties that led to the unfortunate rulings of the *Laval* Triplet, “current Community legislation has both loopholes and inconsistencies and therefore may have lent itself to interpretations of the PWD that were not the intention of the Community legislator, who was looking for a fair balance between the freedom to provide services and the protection of workers’ rights”.⁴¹³

Following the *Laval* Triplet there was a general consensus that change was necessary to improve this highly-criticised legislation, both at national level, as expressed by Ewing in the UK, “Politicians need to address the contradictions and stupidity of the Posted Workers’ Directive and recent European Court of Justice decisions”⁴¹⁴ and also in the European Parliament, with the publication of the ‘Andersson Report’, which called on the Commission to review the Directive, “[the review] should deal in particular with issues such as applicable working conditions, pay levels, the principle of equal treatment of workers in the context of free movement of services, respect for different labour models and the duration of posting”.⁴¹⁵ The impetus and energy for change were present and attention therefore turned to the Commission for an answer, the Rapporteur for the Andersson Report stated, “It is now up to the European legislators to restore the balance between economic freedoms and social rights.”⁴¹⁶

This section on amending the Directive intends to directly respond to the main issues identified in Chapter 2, which can be summarised as follows:

⁴¹² Ibid., Article 3(7).

⁴¹³ ‘The Andersson Report’, European Parliament Resolution on challenges to collective agreements in the EU of 22 October 2008 (2008/2085(INI)) P6_TA(2008)0513, OJ C15E/50, Point 26.

⁴¹⁴ The Institute of Employment Rights: <http://www.ier.org.uk/node/318> ‘Power to the Workers!’ 3 February 2009 [accessed 12 April 2010].

⁴¹⁵ ‘The Andersson Report’, op. cit., Point 30.

⁴¹⁶ European Federation of Building and Woodworkers ‘European Parliament adopted the Andersson Report’ 22 October 2008: <http://www.efbww.org/default.asp?index=714&Language=EN> [accessed 9 May 2013].

- (i) Legal basis of the Directive (Articles 53(1) and 62 TFEU);
- (ii) Defining the Directive's scope (Article 1 Directive);
- (iii) Defining a posted worker (Article 2 Directive);
- (iv) Clarity of terms and conditions of employment (Article 3(1) Directive);
- (v) Minimum rate of pay (Article 3(1)(c) Directive);
- (vi) More favourable terms and conditions of employment (Article 3(7) Directive);
- (vii) Collective agreements and their applicability (Article 3(8) Directive);
- (viii) Collective action (paragraph 22 of the Preamble to the Directive);
- (ix) Public policy (Article 3(10) Directive);
- (x) Monitoring compliance with the Directive (Article 4 Directive).

Those specific issues will form the structure of this section as they also follow the Article numbers of the Directive and as can be seen, the provision that requires the greatest clarification is Article 3 Directive. The format of this section will discuss each of the proposed amendments thoroughly in turn and then in the interim conclusion the finalised suggestions will be presented succinctly so that the amendments to the Directive, as proposed by this thesis, are absolutely clear.

'Solution Number One' will therefore discover how solving the issues by directly amending the legislation may be realised. However, there is one question that needs to be asked prior to analysing how the Directive may best be amended; it needs to be considered whether a directive is the most suitable legislative instrument for meeting the objectives of this legislation.

(i) Should the Directive become a Regulation?

Following the *Laval Triplet*, José Manuel Barroso, the President of the European Commission, made a promise to the European Parliament to propose amending the Directive, "I have clearly stated my attachment to the respect of fundamental social rights and to the principle of free movement of workers. The interpretation and the implementation of the posted workers Directive falls short in both respects. That is why I commit to propose as soon as possible a Regulation to

resolve the problems that have arisen.”⁴¹⁷ It is interesting that the Commission initially considered a regulation to solve the Directive, as Barroso said, “A Regulation has the advantage of giving much more legal certainty than the revision of the Directive itself, which would still leave too much room for diverging transposition, and take longer to produce real effects on the ground.”⁴¹⁸ There was clearly an urgency required in resolving this matter and therefore the general application of a regulation over a directive was appealing on the basis that it would be directly applicable with immediate effect.

A prominent difference between regulations and directives is that the former can be invoked by private parties against other private parties as they have horizontal direct effect, whereas directives, formally at least, only have vertical direct effect. Accordingly, a regulation on posted workers could potentially be more damaging to trade unions, however, as discussed in Chapter 2 this argument against a regulation does not necessarily carry much weight as the Directive was relied on extensively in *Laval*, a private law case. Added to this, the recent case of *Prigge*⁴¹⁹ has strongly indicated the horizontal power of directives.

The legal certainty and immediacy of regulations do offer a much-needed alternative, however, despite these factors, there is also the danger that a regulation would provide absolutely no room for manoeuvre; it is argued that the national transposition available with directives is capable of maintaining the peculiarities of the national labour systems to a greater extent than a regulation which could threaten that flexibility by enforcing more definite, and potentially, more restrictive guidelines. In accordance with Article 288 TFEU, regulations are binding in their entirety, whereas directives are binding as to the result to be achieved; the choice and form of methods of which is left to each Member State to determine. It is concluded that as the posting of workers requires a greater flexibility⁴²⁰ in terms of accepting the differing Member States’ labour systems, this will be more suited to a directive.

In the end, a regulation was never seriously considered or mentioned again to resolve the Directive, indeed a revision of the Directive itself was also

⁴¹⁷ ETUC ‘The Posting of Workers Directive: proposals for revision’ 9-10 March 2010: <http://www.etuc.org/a/7044> [accessed 16 January 2013], 3.

⁴¹⁸ Ibid.

⁴¹⁹ *Prigge*, op. cit.

⁴²⁰ Zahn, ‘The “Europeanisation” of labour law: can comparative labour law solve the problem?’ (2010) NILQ, 61(1): 79-92, 90.

considered by Barroso at this stage, “If we discover during the preparation of the Regulation that there are areas where we need to revisit the Directive itself, I will not hesitate to do so. And let me be clear: I am committed to fighting social dumping in Europe, whatever form it takes.”⁴²¹ Thus, it was clearly an initial suggestion in the preliminary stages of assessing the most suitable solution.

(ii) Legal Basis of the Directive

This thesis emphatically urges an amendment to the legal basis of the Directive, to the extent that if I could only choose one change that could be made to the Directive, this would be it. It is submitted that unless the legal basis changes, nothing will change. The Court has unduly prioritised the freedom to provide services in the posted worker cases, but this could be due to the fact that it has scrupulously kept its interpretation in line with the only legal basis available; this thesis has presented a critical assessment of the Court, however, it must also be appreciated that the Court can only do so much – it cannot create an interpretation where there is no legislative support for that reasoning. Accordingly, if the legal basis of the Directive reflected a more balanced approach of both the economic and social policy objectives of the legislation, the Court would have a greater scope for a more balanced interpretation, “the choice of legal base would suggest that the posted workers Directive has been adopted with the aim of facilitating the cross-border provision of services, rather than as a measure of employee protection.”⁴²²

⁴²¹ ETUC ‘The Posting of Workers Directive: proposals for revision’ 9-10 March 2010: <http://www.etuc.org/a/7044> [accessed 16 January 2013], 3. Barroso’s promise, made on 9 September 2009, followed campaigning from the Socialists and Democrats of the European Parliament in the run-up to the 2009 European elections, also the European Parliament’s Labour Leader stated, “Before British Labour MEPs say yes or no to Barroso we want some concrete proposals from him... A review of the Posted Workers Directive is essential” [European Parliamentary Labour Party ‘We want a better deal from Barroso’: http://www.eurolabour.org.uk/We_want_a_better_deal_from_Barroso_-_Review_of_Posted_Worker_Directive_essential] and Barroso’s promise was made prior to Ireland’s referendum on the Lisbon Treaty on 2 October 2009. Therefore, it may have been motivated by more of a political manoeuvre and indeed it was timed to political perfection as he was successfully re-elected for a second term as the European Commission President. However, whether his promise was purely politically motivated or not is almost immaterial; the fact is that the Commission vowed to amend the Directive and that is exactly what was needed at the time.

⁴²² Davies, ‘Posted Workers: Single Market or Protection of National Labour Law Systems?’, *op. cit.*, 572.

Paragraph 5 of the Preamble to the Directive sets out, “any such promotion of the transnational provision of services requires a climate of fair competition and measures guaranteeing respect for the rights of workers” thus, despite the fact that fair competition and workers’ rights are included, it could be read that their roles are merely subsidiary and they are only effective because they support the primary objective of the Directive: promoting the transnational provision of services. However, this thesis interprets paragraph 5 to mean that all three elements are needed in order to be achieved, as opposed to preferencing one over the others, yet, the Court has significantly preferenced service provision and it is submitted that this can be re-balanced by amending the legal basis, an amendment which has also been suggested in the academic literature, “it would be wise to broaden the legal base of the Posting Directive”.⁴²³

The Directive’s current legal basis is Article 62 TFEU on services and Article 53(1) TFEU on establishment. This not only confirms the Directive as an instrument of the internal market, which does not aptly reflect all of its objectives, but it also ties the Directive to the freedom of establishment which indicates a certain level of permanence to these “temporary” workers. It is understandable that Article 62 TFEU on services constitutes part of the legal basis as that is one of the Directive’s main objectives, however, Article 53(1) TFEU on establishment, which refers to the pursuit of activities of self-employed persons, is not as obvious. Posted workers are not self-employed, by their nature they are employees subordinate to the home State undertaking. Therefore, perhaps the self-employment factor refers to the undertaking itself, but this would indicate that in some sense that undertaking is a beneficiary of the freedom of establishment, however, there should be no such ‘establishment’ in the host State; the only party that crosses a border are the posted workers and neither should they in any sense establish themselves in the host State. The rules on establishment should not form part of the legal basis as it pertains too closely to the option of applying all of the host State’s rules which would eradicate the temporary nature of this unique category of worker. Arguably, the reason that Article 53(1) TFEU forms part of the legal basis is because it provides for the ordinary legislative procedure as the

⁴²³ Houwerzijl, ‘Towards a more effective posting directive’ in Blanpain (Editor), ‘Freedom of Services in the European Union, Labour and Social Security Law: The Bolkestein Initiative’ (2006) *Bulletin of Comparative Labour Relations* – 58, Part II Applicable Law, 15: 179-198, 195.

means for adopting the Directive. However, it is hereby submitted that that is unnecessary as Article 62 TFEU already indicates this, “The provisions of Articles 51 to 54 shall apply to the matters covered by this Chapter.” Thereby, Article 62 TFEU brings Article 53(1) TFEU and the procedure for adopting the Directive within its scope without needing to make explicit reference to the chapter on establishment. To conclude, from the current legal basis Article 62 TFEU on services should be maintained, whereas Article 53(1) TFEU on establishment should be removed.

As aforementioned, the social policy provisions of the Treaty should be added to the Directive’s legal basis in order to grant a legitimate expression to these social rights, that also form part of the Directive’s objectives, so that they can be effectively relied on by the Court in practice, as opposed to only being granted theoretical support; it is all very well declaring equality, but ultimately, the legislation needs to prove it. The fact that the Directive does not have a legal footing on the social policy provisions of the Treaty was recognised as an issue from its earliest stages of development.⁴²⁴ The lack of social responsibility is most likely due to the time in which this Directive was adopted, “As an alternative the Social Chapter of the Treaty, for regulating with its accent on working conditions, did not offer a sound legal basis in 1996 (being of pre-Amsterdam era).”⁴²⁵ It is submitted that given the legislative changes that have occurred since the Lisbon Treaty,⁴²⁶ an inclusion of one of the Articles from the social policy chapter into the Directive’s legal basis would prove both timely and effective.

Article 153 TFEU should become part of the Directive’s legal basis as it sets out to achieve the objectives of Article 151 TFEU which has been recognised as a “significant mechanism in the toolkit... a (sound) device that may be used to embed employment rights in EU Law.”⁴²⁷ Article 151 TFEU makes reference to the European Social Charter and the Community Charter of the Fundamental Social Rights of Workers and intends to promote social protection and dialogue

⁴²⁴ See Chapter 1 Part 1.

⁴²⁵ Hellsten, ‘On the Social Dimension in Posting of Workers: Reasoning on Posted Workers Directive, Wage Liability, Minimum Wages and Right to Industrial Action’ (2006) Publication of Labour Administration, Hanken School of Economics Helsinki, Finland, 7.

⁴²⁶ Title X Social Policy Articles 151-161 TFEU. This is supported by Article 3(3) TEU which establishes a highly competitive social market economy, aiming at full employment and social progress and Article 9 TFEU promotes a high level of employment and the guarantee of adequate social protection.

⁴²⁷ Lecomte, ‘Embedding Employment Rights in Europe’ (2011) CJEL, 17(1): 1-22, 20.

between management and labour whilst respecting the diverse forms of national practices. Article 153 TFEU provides the requisite detail to these objectives by specifying which areas of social policy come within the Union's competence and it authorises the Union to adopt directives in this area. The inclusion of Article 153 TFEU into the Directive's legal basis should aptly bolster workers' rights and re-balance the Directive's objectives of attaining both economic and social values.⁴²⁸

The ETUC also proposed that the legal basis should be amended to incorporate the social policy articles in the Treaty and it suggested that the stated aims of the Directive, in respect of the protection of workers as well as a climate of fair competition, should be included in the body of the Directive itself, not just in the Preamble. This latter suggestion is not necessarily an urgent measure as it is submitted that provided the legal basis changes to expressly support social policies, this should suffice. Also, this thesis aims for balance not for primacy over either the economic or social objectives of the Directive. Therefore, it must be borne in mind that the social policies should not be over-endorsed to the extent that the freedom to provide services loses its value. As opposed to reiterating the well-versed economic versus social paradigm, this thesis intends to show that these elements do not need to be continuously pitted against one another, but instead some form of balancing can be attained.

Finally, in respect of amending the legal basis, it is necessary to consider incorporating Article 45 TFEU on the free movement of workers. It is well-established that posted workers are unique and accordingly they do not fit neatly into one of the four categories of services: (i) active (service provider moves); (ii) passive (service recipient moves); (iii) corresponding (only the service moves); (iv) externally induced (both the service provider and recipient move).⁴²⁹ In the

⁴²⁸ Notably, Article 153 TFEU has already been implemented as the legal basis for a number of directives, including: Council Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work, [1989] OJ L183/1; Directive 2003/88/EC of the European Parliament and of the Council concerning certain aspects of the organisation of working time, [2003] OJ L299/9; Directive 2008/104/EC of the European Parliament and of the Council on temporary agency work, [2008] OJ L327/9.

⁴²⁹ Schroeder, *Grundkurs Europarecht* (Second Edition, 2011) Verlag C.H. Beck, 287. These four categories are prevalent in the Germanic legal tradition whereby, arguably, the academics' voice is stronger in comprising the doctrine and where there is a great enthusiasm to categorise certain elements and group cases together, which is helpful initially but can also be restrictive, or even artificial, if the type of service does not easily fit into these boxes, as is the case with posted workers.

case of postings the service provider remains in the home State and the service recipient remains in the host State during the posting, therefore, the service itself comprises the only cross-border movement. The difficulty is that this “corresponding” provision normally relates to examples such as the radio or the internet crossing the border, however, in this case it is the posted workers that constitute the service, which starkly opposes the ILO’s fundamental principle that labour is not a commodity.⁴³⁰ The seminal free movement case of *Dassonville*⁴³¹ revealed the opportunities presented by the internal market through parallel trading; buying goods more cheaply in one Member State and selling them on at a higher price in another. This is accepted as profiting from the economic market and maximising on the advantages of the EU. However, exploiting people in this way under the protection of ‘service provision’ destroys any attempt at a social market. The danger is that the workers themselves are not adequately protected as the current legal basis has the effect of only supporting the undertaking making the posting and as the posted workers are not able to rely on Article 45 TFEU they are merely marionettes playing their part as subject to the service provider. Therefore, if workers’ rights are truly going to be accounted for, Article 45 TFEU should be implemented into the legal basis.

Prior to the Directive, and provided the workers were not “key personnel”, posted workers would have been covered by the free movement of workers, not services, “As a main rule [in the early 1960s] it was stipulated that all workers, whether permanently or temporarily moving to another Member State, were covered by the free movement of *workers*... an exception to the main rule was created for this ‘very specialised, technical or managerial key personnel’: they could be posted to another Member State under the freedom to provide services.”⁴³² Accordingly, Article 45 TFEU was initially considered as formulating part of the legal basis, “Article [45 TFEU] (free movement of workers) was several times proposed as being the necessary legal basis for the instrument but the Commission always firmly rejected it. One reason for avoiding Article [45] was to reject also Article [115 TFEU] and thus keep the Directive under qualified majority voting (with the European Parliament in the co-decision

⁴³⁰ Article I(a), ILO, Declaration of Philadelphia: Declaration concerning the aims and purposes of the ILO, adopted at the 26th session of the ILO, Philadelphia, 10 May 1944.

⁴³¹ Case 8/74 *Procureur du Roi v Benoît and Gustave Dassonville* [1974] ECR 837.

⁴³² Houwerzijl, ‘Towards a more effective posting directive’, op. cit., 182.

position), notwithstanding the British criticism.”⁴³³ The interest in passing the legislation seemed to overtake consideration of the most suitable legal basis. Article 46 TFEU stipulates that the ordinary legislative procedure is to apply to the issuing of directives and regulations on the free movement of workers thereby rendering this previous reasoning redundant. However, it is clear that Article 45 TFEU has always been strongly associated with the posting of workers.

More recently, the European Parliament has suggested incorporating Article 45 TFEU into the legal basis. Point 8 of the Andersson Report⁴³⁴ emphasised the need to safeguard and ensure equal treatment and equal pay for equal work in the same workplace as laid down in Articles 45 and 18 TFEU. Furthermore, Point 21 of the Andersson Report stated, “the limited legal basis of free movement of the PWD may lead to the PWD being interpreted as an express invitation to unfair competition concerning wages and working conditions; therefore considers that the legal basis of the PWD could be broadened to include a reference to the free movement of workers”.⁴³⁵ Article 45 TFEU would provide a greater scope for equality of treatment compared to Article 56 TFEU, “Under the free movement of workers [Article 45 TFEU] pay discrimination between nationals and non-nationals is not allowed. Migrant and domestic workers must be treated equally in their access to the labour market, wages and other working and employment conditions.”⁴³⁶

Article 45 TFEU is therefore an imperative element to the posting of workers, however, it needs to be considered whether posted workers already come within its scope. The definition of a worker has been established by the case law to entail “the pursuit of effective and genuine activities.”⁴³⁷ This is a very broad definition and *Levin* confirmed that it includes part-time workers and also work-seekers. *Trojani* later added to this by establishing, “the existence of the constituent elements of any paid employment relationship, namely subordination and the payment of remuneration.”⁴³⁸ In light of this, posted workers do fall within this definition as their work is under the subordination of the service

⁴³³ Hellsten, ‘On the Social Dimension in Posting of Workers: Reasoning on Posted Workers Directive, Wage Liability, Minimum Wages and Right to Industrial Action’, op. cit., 7.

⁴³⁴ ‘The Andersson Report’, op. cit., Point 8.

⁴³⁵ ‘The Andersson Report’, op. cit., Point 21.

⁴³⁶ Houwerzijl, ‘Towards a more effective posting directive’, op. cit., 182.

⁴³⁷ Case 53/81 *D.M. Levin v Staatssecretaris van Justitie* [1982] ECR 1035, [17].

⁴³⁸ Case C-456/02 *Michel Trojani* [2004] ECR I-7573, [22].

provider, in return for payment and therefore constitutes an effective and genuine economic activity. Article 45 TFEU includes any form of gainful employment including service provision, as corroborated by Regulation No. 492/2011, “Such right should be enjoyed without discrimination by permanent, seasonal and frontier workers and by those who pursue their activities for the purpose of providing services.”⁴³⁹

It could be argued that nothing need be done to the legal basis as there is already some scope for posted workers to invoke Article 45 TFEU, however, that would not be advisable for two reasons: (i) “*Laval* gives the Posting of Workers Directive a ‘pre-emptive’ effect, reading it, contrary to its own clearly expressed intent, as if it were a ceiling not a floor. The justification for doing this is that the Directive gives expression to Article [56 TFEU], and, therefore, protects above all the interests of service providers, rather than those of workers, either their own employees or those employed elsewhere.”⁴⁴⁰ Therefore, the scope for interpretation must be broadened;⁴⁴¹ and (ii) as posted workers do not migrate to the host State but their deployment is temporary, the Court has interpreted this to infer that posted workers do not become part of the host State’s national labour market⁴⁴² thereby exclusively falling within the scope of service provision as opposed to the free movement of workers. This thesis does not agree with the Court that access to the labour market is negated on the condition that the posted workers return to their home State following completion of the work – for the reason that during the period of posting the host State’s labour market will inevitably be disrupted; regardless of how long the workers will be present in the host State (and bearing in mind there is no time limit on what constitutes “temporary”) they do, for a finite period of time, access the labour market. Moreover, the Court has inadvertently expressed that posted workers may gain access to the host State’s labour market, “the posting of workers via temporary agencies, was explicitly mentioned by the ECJ in *Rush Portuguesa* as not falling under the freedom to provide services but under the free movement of workers.

⁴³⁹ Regulation (EU) No. 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, [2011] OJ L141/1, Preamble [5].

⁴⁴⁰ Deakin, ‘Regulatory Competition in Europe after *Laval*’ (2008) Centre for Business Research, University of Cambridge Working Paper No. 364, 23.

⁴⁴¹ According to the Court the Directive, “seeks in particular to bring about the freedom to provide services” *Rüffert*, [36].

⁴⁴² *Rush Portuguesa*, [15]; *Vander Elst*, [21]; *Finalarte*, [22], op. cit.

Here, the ECJ drew the line where it can no longer be denied that the posted workers indeed have access to the labour market of the host country.”⁴⁴³ Due to the Court’s general take on the posted workers’ temporary deployment and for the sake of clarity, it cannot be assumed that Article 45 TFEU will be available and therefore needs to be added to the legal basis in order to boost worker protection.

It is apparent that the posting of workers is not a typical services scenario, indeed if this was a provision of services in its truest sense it could be argued that the Directive is *ultra vires* as it obliges the service provider to comply with certain host State laws. Subsequently, it is somewhat hypocritical that these unique workers that are subject to the rules of the host State under Article 3(1) Directive can only rely on the protection of a service provider, which in effect only protects the employer. Therefore, it is argued that as the obligations of the legislation are unique, it follows that the protection available should also be unique so that the workers themselves may have an alternative Treaty provision to rely on, such as Article 45 TFEU.

(iii) Defining the Directive’s Scope

Article 1 Directive defines the Directive’s scope. However, it is as if the Directive has always suffered from an identity crisis; in the Commission’s first Proposal it stated that, “*this is not a labour law instrument*, but a proposal concerning international private law closely related to the freedom to provide services [emphasis added].”⁴⁴⁴ Yet, it regulates the movement of labour. Therefore, what is it? It is most likely that this somewhat unsettling statement intended to firmly place posted workers under the provision of services so as to divorce them from the concept of the free movement of workers, as opposed to substantively reshaping the very purpose of the Directive which is to govern the movement of temporary labour.

Article 1(3) Directive provides that there are three settings in which workers may be posted: (i) a service provider posts workers to a service recipient in another Member State; (ii) a service provider posts workers to an undertaking

⁴⁴³ Houwerzijl, ‘The Posting of Workers Directive: About the Background, Content and Implementation of Directive 96/71/EC’ in *De Detacheringsrichtlijn* (2005) Deventer: Kluwer, 384.

⁴⁴⁴ Proposal for Directive COM(1991) 230 final, op. cit., [24].

that it owns in another Member State; or (iii) a temporary employment undertaking or placement agency hires out workers to a user undertaking in another Member State. The key issue here is that the Directive does not adequately define how established an undertaking must be in the home State in order to qualify as a genuine service provider and the specification that in all three settings there must be an employment relationship between the undertaking making the posting and the posted worker is limited to it being only *during* the posting. What about the employment relationship on completion of the period of posting? There needs to be a firm guarantee that the posted workers will return to their home State, as so many of the service provider's privileges hinge on this condition. These points of neglect are capable of leading to a misuse of the Directive.

In tackling this issue, and avoiding potential abuses such as letter-box companies, the ETUC stated that what is needed is a clearer definition of a "posted worker" and "transnational provisions of services".⁴⁴⁵ A greater clarity is certainly required from an amended Directive; the issue of a lack of clarity was recognised by the Council and the Parliament as early as the Directive's first Proposal.⁴⁴⁶ The ETUC suggested that whereas before postings could take place in three contexts: (sub)contracting; intra-corporate transfers; and temporary agency work, the Directive must be revised to remove the option of intra-corporate transfers providing a platform for posting as it can too easily be used to create artificial corporate structures so as to circumvent all of the obligations of the host State and, in reality, it might not incorporate an actual provision of services. However, the ETUC added that the Directive would apply to such transfers where they do involve the provision of services. In my opinion, this introduces unnecessary ambiguity and could lead to misinterpretation. Rather than stating that the Directive only sometimes applies to intra-corporate transfers, it would be far more beneficial to provide greater clarity on what that transfer must constitute in order to qualify, for instance, it must involve a cross-border economic activity in which the service provider must be genuinely established in the home State and the subsidiary must undertake genuine economic activity in the host State.

⁴⁴⁵ Proposal 3, ETUC 'A Revision of the Posting of Workers Directive: Eight proposals for improvement', op. cit., 23.

⁴⁴⁶ See Chapter 1 Part 1.

These three different methods of posting have been transposed divergently, “The definitions of the three possible posting situations in Article 1(3) are not transposed precisely in many Member States. This increases the chance of confusion between national and European definitions of posting... Therefore Member States should revise their national implementation legislation on this point.”⁴⁴⁷ However, as opposed to obliging the Member States to amend their legislation, the legislation itself should be revised to specify the importance that the service provider and recipient should be genuinely established in the home and host States respectively, thus, the posting of workers involves a genuine cross-border economic activity.

As for guaranteeing that the posted workers return to work for the service provider in the home State on completion of the posting, whilst this is a necessity in terms of guaranteeing that they do not enter the host State’s labour market, the practical implementation of such an obligation would prove unfeasible for two reasons: (i) in the case of a placement agency under Article 1(3)(c) Directive the agency would have deployed the worker for that specific posting; and (ii) requiring the worker to return to the same undertaking would conflict with their freedom to choose an occupation and right to engage in work under Article 15 Charter. Therefore, imposing a time limit on the period of posting would be the most suitable solution, as discussed below.

(iv) Defining a Posted Worker

Article 2 Directive does not define what a “limited period” constitutes and therefore the notion of ‘temporary’ can be exploited. “The PWD is based on the assumption that posted workers do not become part of the host country’s labour market. However, this assumption is increasingly becoming a fiction.”⁴⁴⁸ This thesis is in complete agreement with this opinion; the premise is that technically, as the work is temporary, the workers do not enter the host State’s labour market, but the disruption that has been seen in the labour markets in the posted worker cases denies this premise. This same issue can be seen in relation to GATS Mode

⁴⁴⁷ Houwerzijl, ‘Towards a more effective posting directive’, op. cit., 186.

⁴⁴⁸ ETUC ‘A Revision of the Posting of Workers Directive: Eight proposals for improvement’, op. cit., 23.

4 on posted workers who are also considered by the trade negotiators not to enter the local labour market as they are only temporarily in the host State and they themselves do not seek residency, however, “Immigration officials, on the other hand, argue that ‘temporary’ often extends to periods as long as three years and therefore, even if service providers do not seek to, they do in fact participate in the local labour market”.⁴⁴⁹

The temporary nature of posted workers needs to be maintained as it is the very definition of “posted”, yet there also needs to be a more definite guarantee that the workers will leave the host State in order to complete the posting. As discussed above, it would be unfeasible to impose that posted workers return specifically to the service provider that posted them, on completion of the posting, therefore, stipulating a time frame on what constitutes a “limited period” is the most practical solution. Subsequently, the follow-up question is: how long is temporary?

Houwerzijl suggested imposing a time limit in accordance with the social security Regulation, “It would have been better if the Posting Directive had referred – at least for the postings mentioned under (a) and (c) – to the time limit with regard to social security (in Regulation 1408/71 and – in the future – Regulation 883/2004).”⁴⁵⁰ Notably, in 2010, Regulation 883/2004 on the coordination of social security systems⁴⁵¹ prolonged the period during which employees may remain subject to their home State’s social security system from twelve to twenty-four months. It is submitted that this time limit sets a precedent for workers to be in a host State and still affiliated to their home State’s social security system and accordingly should also be applied to the Directive to establish the period of time that constitutes a posting; it is necessary that the time period is not arbitrarily reached but the figure is grounded in reasoning, and in this case, it follows the reasoning of Regulation 883/2004. If a period of posting will take longer than twenty-four months to complete, then this period can be extended on the condition that the Commission is informed of the extended period. This requirement is inspired by the transitional period which dictates that limiting

⁴⁴⁹ Hatzopoulos, ‘Liberalising trade in services: creating new migration opportunities?’ (2010) College of Europe, Research Paper in Law No. 1/2010, 26.

⁴⁵⁰ Houwerzijl, ‘Towards a more effective posting directive’, op. cit., 187.

⁴⁵¹ Regulation (EC) No. 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, [2004] OJ L166/1.

accession States to the old Member States' labour markets beyond the initial two year probationary period may be done, provided that the Commission is informed thereof.

(v) Clarity of Terms and Conditions of Employment

Article 3(1) Directive sets out the terms and conditions of employment that will be extended to posted workers, inevitably, these will greatly differ from State to State and within the relevant sectors, therefore, it is vital that these terms and conditions are made abundantly clear to the posted workers in an accessible format so as to improve worker protection and legal certainty, "Member States should translate their labour conditions, laid down in legislation and extended collective agreements, into an accessible package of conditions that corresponds with the conditions mentioned in Article 3(1)."⁴⁵² The major condition of employment that has been a point of contention is the minimum rate of pay under Article 3(1)(c) Directive. This thesis advocates that the "minimum" provision should be likened to the 30 mile per hour limit on the roads; it is the limit, not the goal.

(vi) Minimum Rate of Pay

The Directive does not take into account the fact that not every Member State has a minimum rate of pay and for those that do, the form of minimum wage differs greatly from State to State; from being hourly, daily, weekly or even monthly.⁴⁵³ It must be asked how much of a problem is this? In reality, most Member States do make provision for a statutory minimum wage⁴⁵⁴ or set out the minimum wage in universally applicable collective agreements.⁴⁵⁵ However, there are six Member

⁴⁵² Houwerzijl, 'Towards a more effective posting directive', op. cit., 192.

⁴⁵³ European Industrial Relations Observatory On-line 'Minimum wages in Europe' 3 August 2005: <http://www.eurofound.europa.eu/eiro/2005/07/study/tn0507101s.htm> [accessed 17 January 2013].

⁴⁵⁴ For the list of countries in respect of minimum wages, see: Commission Staff Working Document, 'Commission's services report on the implementation of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services' SEC(2006) 439 final, section 4.7. Member States with a statutory minimum wage are: Bulgaria, Czech Republic, France, Greece, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia and United Kingdom.

⁴⁵⁵ Belgium, Finland, France, Germany, Luxembourg, Malta, Portugal and Spain.

States in which there is no statutory minimum wage or minimum wage set out in universally applicable collective agreements, even on a sectoral basis,⁴⁵⁶ and therefore there is a heavy reliance on collective agreements to negotiate wage rates in those Member States. Accordingly, the differing methods of extending the minimum rate to posted workers must be broadened by the Directive.

Article 3(1)(c) Directive has been interpreted by the Court as a maximum, as opposed to a minimum. The effect of this is that it aggravates social dumping, caused by undercutting the host State workers, leading to greater hostility and consequent collective action that could be avoided if there was a greater scope for equality. Lowering labour standards is a major problem of the Directive that can be seen most prevalently with the minimum rate of pay, “At a time when active steps are being taken to increase the money supply, it does not need an economist to contemplate the contradiction of a labour market policy geared to low standards. Nor – in current circumstances – does it need an economist to contemplate the stupidity of labour laws such as the EU’s Posted Workers’ Directive and the accompanying ECJ judgments, which remove more of the remaining fences in the galloping ‘race to the bottom’.”⁴⁵⁷

It is argued that equality must be the aim, thus, the notion created by the Court whereby anything more than the minimum rate of pay goes above and beyond what the Directive guarantees needs to be quashed. When the Directive was first reviewed in 2003 by the Commission it stated that the mandatory rules provided under Article 3(1) Directive, “constitute a nucleus of minimum protection for posted workers, while respecting the principle of equality of treatment between national and non-national providers of services... and between national and non-national workers.”⁴⁵⁸ Only a minimum is guaranteed by the legislation, but equality is also an aim of the Directive. Accordingly, it needs to be determined whether the minimum rate should be reinforced, or whether the Directive should be amended to cater for the going rate.

The Andersson Report called on the Commission to consider “the need to safeguard and to strengthen equal treatment and equal pay for equal work in the

⁴⁵⁶ Austria, Cyprus, Denmark, Estonia, Italy and Sweden.

⁴⁵⁷ IER: <http://www.ier.org.uk/node/318> ‘Power to the Workers!’ 3 February 2009 [accessed 12 April 2010].

⁴⁵⁸ Commission Communication COM(2003) 458 final, op. cit., Section 2.3.1.1.

same workplace”.⁴⁵⁹ Therefore, the European Parliament clearly endorsed the going rate, however, arguably this pursuit of equality was somewhat diminished in the final Report as the Draft Anderson Report was even more bold and decisive in urging the Commission to consider, “a possibility in the Directive for Member States to refer in law or collective agreements to the ‘habitual wages’ applicable in the place of work in the host country as defined in the ILO 94 and not only ‘minimum’ rates of pay.”⁴⁶⁰ The explicit reference to ‘habitual wages’ cannot be found in the final Report and the reason for the Parliament’s reluctance to include it is unclear. Nevertheless, it must be conceded that the slight change in the Parliament’s proposal and lessening of its endorsement to uphold the ‘going rate’ is also reflected in this thesis. Following the *Laval* Triplet my opinion was that the Directive must be amended to incorporate the ‘going rate’ for a suitable solution. However, upon reading the reasoning of the ETUC’s suggestion of restoring the minimum character of the Directive, my opinion has changed and this thesis has been inspired by the ETUC’s proposed solution on this issue.

The ETUC considered amending the Directive to guarantee the ‘prevailing rate of pay’ of the host State but, however decided against it as there may be uncertainty in respect of which pay rate represents the prevailing rate of pay in legally binding collective agreements. It is surprising that the ETUC; arguably, the entity most likely to insist on guaranteeing the ‘prevailing rate of pay’ in the Directive, has instead opted to reinforce the minimum character of the Directive. In an ideal world, this thesis supports the imposition of equal working conditions in the Directive,⁴⁶¹ however, it is submitted that there are four very important and practical reasons why this would not be workable: (i) as recognised by the ETUC, the uncertainty of which wage is the prevailing rate of pay could lead to greater misinterpretation than guaranteeing the minimum rate and as uncertainty has been a major issue of the Directive the need to ensure clarity in respect of pay is a necessary step; (ii) the issue is not the ‘minimum’ character of the Directive, but that the Court has interpreted it as a ‘maximum’; (iii) the minimum wage has been

⁴⁵⁹ ‘The Andersson Report’, op. cit., Point 8.

⁴⁶⁰ European Parliament Draft Report on challenges to collective agreements in the EU of 8 May 2008 (2008/2085(INI)), Point 23.

⁴⁶¹ The Spanish Presidency of the Council of the EU also aimed for total equality, “We are committed to the principle of ‘equal pay for equal work’ for posted workers”: <http://www.efbww.org/default.asp?index=760&Language=EN> [accessed 31 August 2013]. However, during the period of Presidency (January – June 2010) this vision did not become a reality.

prescribed by the host State as a suitable wage to live on in that Member State. The greater issue is when service providers are able, in accordance with the Directive, to pay rates below the collectively agreed industry levels and wages are thus pushed below the minimum; and (iv) the opportunities of the internal market must be supported as an equally important objective of the Directive and this includes commercial opportunities available to service providers, such as benefiting from lower wage and employment conditions in the Union, this is after all one of the unique selling points of using posted workers.

The ETUC proposed, “The legislator must state unequivocally the minimum character of Art 3.1 in its stated aims and objectives as well as by recognizing the autonomy of social partners to fight for, negotiate and agree higher levels of protection.”⁴⁶² The ability to negotiate more favourable conditions should have the effect of depriving the Directive of its maximum character, therefore, this also incorporates the difficulties that have been encountered by Articles 3(7) and 3(10) Directive. In defining the applicable ‘rates of pay’ the ETUC clarified that allowances shall in principle not be considered as part of the wage and, when defining the rate of pay, as well as the national law and/or practice, it may also be defined by collective agreements, in order to bolster the significance of collective agreements which is imperative in those Member States where a statutory minimum wage does not exist.

Reinforcing the minimum conditions as opposed to amending the Directive to provide the going rate is arguably the most pragmatic solution. The key distinction is altering the interpretation available to the Court so that it is clear that the minimum standards represent the limit, not the goal. In achieving this, the ETUC has simply suggested removing the word “minimum” from the list of hard core terms under Article 3(1) Directive. However, my concern is that the word may be removed but its legacy may not; the Directive was adopted seventeen years ago in 1996 and its minimum character has been enforced more and more over the years. Therefore, in the interests of greater clarity, this thesis submits that the Directive should prescribe “at least the minimum” which prohibits anything below the minimum and allows the minimum rate of pay where appropriate in the interests of encouraging service provision, whilst the use of “at least” should be a

⁴⁶² Proposal 4, ETUC ‘A Revision of the Posting of Workers Directive: Eight proposals for improvement’, op. cit., 28.

constant and explicit reminder that the legislation encourages aiming for equality. Subsequently, the counterpart requisite to prescribing “at least the minimum” is ensuring the possibility of more favourable conditions so that the opportunity to improve the terms and conditions of employment beyond the minimum rate is guaranteed.

The final amendment that must be made in this respect is ensuring that the conditions stipulated under Article 3(1) Directive apply to all workers from day one of the period of posting. The fact that this thesis has endorsed “at least the minimum rate of pay” as opposed to the going rate, is in itself some form of compromise, therefore, it must consequently be ensured that, just as the service provider has been granted this benefit, there must be equal protection for workers’ rights. Article 3(2-5) Directive makes provisions for derogating from Article 3(1)(b) and (c) Directive where the length of the posting does not exceed, as an example, one month. However, this could be manipulated by rotating the posted workers every month, so to negate this possibility and in respect of the issues surrounding any such threshold,⁴⁶³ the Directive must insist that under no circumstances can there be an option, at any time, to exempt the host State’s mandatory terms and conditions of employment.

(vii) More Favourable Terms and Conditions of Employment

As described above, the Court has clarified that posted workers are not legible to more than the minimum rate of pay, yet, due to Article 3(7) Directive it is submitted that that was not the intention of the Directive as this provision indicates that the Directive encourages more favourable terms where possible.

Article 3(7) Directive states, “Paragraphs 1 to 6 shall not prevent application of terms and conditions of employment which are more favourable to workers.” Barnard stated, “While many commentators, together with Advocate General Bot in *Rüffert*, assumed this meant that the *host* state could impose higher standards, the ECJ disagreed.”⁴⁶⁴ Whilst this thesis is in agreement with AG Bot’s reading of the Directive on this point, other authors have argued that the Court’s

⁴⁶³ This was a major point of contention during the co-decision stage of the Directive, as detailed in Chapter 1 Part 1.

⁴⁶⁴ Barnard, ‘The UK and Posted Workers: The Effect of *Commission v Luxembourg* on the Territorial Application of British Labour Law’, op. cit., 126.

interpretation was not unexpected, “This stance could hardly come as a surprise. Quite apart from the drafting history, from a free movement of services perspective, host State freedom on this point could easily undermine the effective exercise of the freedom.”⁴⁶⁵ From my perspective, this adds further reason to change the legal basis so that the favourability provision may be more effective in practice.

The case law established that this provision only refers to more favourable terms of the home State and can only apply if the posted workers already receive more favourable terms in their home State (bearing in mind that the home State employer continues to be responsible for paying the posted workers) or, if the home State employer voluntarily agrees to the more favourable terms in the host State. The Court’s interpretation of Article 3(7) Directive favours the service provider over and above the workers, however, it is submitted that this provision has the potential to fulfil the objective of enhanced worker protection, whilst having a spill-over effect of also supporting fair competition by encouraging more comparable work conditions between the posted and host State workers. Accordingly, the provision needs to be re-worded, as supported by the legal scholarship,⁴⁶⁶ so that the tone of the Directive encourages the service provider and recipient to aim high rather than entrenching labour standards at the very lowest. It is suggested that Article 3(7) Directive is amended to specify that the favourability provision applies to the terms and conditions of employment of the host State as well as the home State. Also, it needs to be added that the workers may undertake collective action to ensure this provision.

It should be recognised by this stage that all of the suggested amendments build on from each other in order to create a well-functioning Directive that truly incorporates all elements of its objectives. For example, the terms and conditions of employment need to be set out more clearly by the Member States, in particular, the minimum rate of pay needs to be clarified as the limit, not the goal, this is to be supported by improving the applicability of the more favourable

⁴⁶⁵ Evju, ‘Revisiting the Posted Workers Directive: Conflict of Laws and Laws in Contrast’, *op. cit.*, 174.

⁴⁶⁶ Bercusson, *European Labour Law* (Second Edition, 2009) CUP, 733. Bercusson stated that, as well as an amendment to the Directive, “An attempt should be made to clarify and extend the [favourability] principle in a specific EU legal measure, or even in the Treaty.”

conditions of employment, which can be laid down by statutory provisions or collective agreements.

(viii) Collective Agreements and their Applicability

The sub-heading above entitled, ‘Clarity of Terms and Conditions of Employment’ stipulated that the information on terms and conditions, with a focus on the minimum rate of pay, must be set out by all Member States in a clear and accessible format in order to improve worker protection and legal certainty. This is because the Directive provides a hardcore list of mandatory conditions to be extended to posted workers which is positive in theory, as it should improve fair competition by ensuring that the host State’s laws are respected, however, it is problematic in practice as the conditions do not exist in the same format in all Member States, for example, as aforementioned, not every Member State has a minimum rate of pay. As has been well-documented, Sweden does not have a statutory minimum rate of pay but relies heavily on the social partners through collective bargaining to agree on the rate of pay that will be laid down in a collective agreement. Unfortunately, the Court has made the application of collective agreements very restrictive and the emphasis that has been bestowed upon statutory minimum conditions undermines the self-regulated labour model, “Directive 96/71/EC... breaks with the tonic which seemed to be confirmed in the nineties as regards the ‘recognition’ of collective bargaining as a first rate means of regulating European work conditions”.⁴⁶⁷ Therefore, as well as improving the clarity and availability of the terms and conditions of employment, the Directive must be amended so that it is more accommodating of the differing methods by which this is accomplished.⁴⁶⁸ The Court can only work within the legal parameters that are available, therefore, in light of the differing national labour systems and the fact that the Directive is not intended to be a harmonising directive, the political institutions must show a greater recognition of the differing

⁴⁶⁷ Ojeda-Aviles, ‘European Collective Bargaining and Posted Workers: Comments on Directive 96/71/EC’, op. cit., 127.

⁴⁶⁸ In accordance with Article 4(2) TEU, which provides that the Union shall respect the equality of Member States as well as their national identities inherent in their fundamental structures which includes regional and local self-government.

forms of collective agreements that will apply to posted workers and not just the statutory terms and conditions.

The applicability of collective agreements in the Directive has been an ongoing saga and it is necessary to contextualise this by briefly revisiting its history. From the Directive's first Proposal in 1991 it was stipulated that collective agreements may only apply if they cover the whole of the occupation and industry concerned and have an *erga omnes* effect. In the co-decision procedure the Council recognised that this was an unduly steep requirement and suggested that collective agreements which apply generally should suffice. Therefore, in the 1993 amended Proposal the provision of '*erga omnes* effect' does not appear. Article 3(4) of the amended Proposal provides that collective agreements which are observed by all undertakings in the geographical area and in the profession or industry concerned will apply, or in the absence thereof, those which have been declared generally applicable, "The expanded formula takes greater account of the diversity of collective bargaining systems within the Community, whilst moving further away from the paradigm case of the legally binding norm."⁴⁶⁹ However, Article 4(3) of the amended Proposal added that if collective agreements which are deemed to be generally applicable have not been published, the foreign undertaking will not be bound by the collective agreement.

Two further amendments were made, that appear in the final version of the Directive: (i) the 'universally applicable' requirement was added, which suggests that the legislator has manipulated the Council's advice by removing the words '*erga omnes*' yet maintaining their effect; and (ii) Article 4(3) of the amended Proposal was removed so that generally applicable collective agreements do not need to be declared in the implementing legislation. As has been extensively discussed in Chapter 2, the Court wrongfully invoked this obsolete provision in reaching its decision in both *Laval* and *Rüffert*.

Both *Laval* and *Rüffert* failed because the collective agreements in the cases were seen to have no legitimate expression. In *Rüffert* the collective agreement at stake had not been declared universally applicable and as there is a universally applicable collective agreement in the construction industry in Germany, the Court held that that must apply, despite the fact that the latter

⁴⁶⁹ Davies, 'Posted Workers: Single Market or Protection of National Labour Law Systems?', *op. cit.*, 580.

agreement reserves the possibility of applying terms of employment that are more favourable to workers under other collective agreements. Therefore, the national law and practice would have authorised the collective agreement that was intended to apply to the construction site, but due to the Court's narrow reading of the Directive, it was dismissed. The Member States cannot be expected to amend their national labour systems to suit this restrictive, and at times incorrect, interpretation of the secondary legislation; Article 3(8) Directive must be amended.

Furthermore, it is submitted that the prioritised use of universally applicable agreements over any other type of collective agreement is not the most suitable approach for this Directive, "The problem lies in that, on one hand, large countries have problems in negotiating national agreements,⁴⁷⁰ and on the other, national or broadly-based usually govern relatively imprecise aspects, for instance structural details, while the Directive envisages the application of clauses on working days, overtime, work periods and rest, etc."⁴⁷¹ In view of this reasoning, the prominence granted to collective agreements that are universally applicable is not the perfect marriage in meeting the requirements of the Directive and so collective agreements that are simply generally applicable should be granted equal priority. Also, the *erga omnes* effect was omitted due to the Council's advice in 1992, therefore, it is high-time that the legislator genuinely acknowledged that advice.

Where there is no system for declaring collective agreements to be of universal application, Article 3(8) Directive details that Member States may base themselves on collective agreements which are "generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, and/or collective agreements which have been concluded by the most representative employers' and labour organizations at national level and which are applied throughout national territory" and this must be in line with the equal treatment principle. Several amendments need to be made to this provision: (i) arguably, this should have been interpreted to mean that *de facto* collective agreements are applicable, but this possibility was not considered by the Court,

⁴⁷⁰ For example, in Germany district or regional agreements are usually negotiated: Zachert, 'Lezioni di Diritto del lavoro tedesco' (1995) Trento, p. 50.

⁴⁷¹ Ojeda-Aviles, 'European Collective Bargaining and Posted Workers: Comments on Directive 96/71/EC', op. cit., 128.

therefore, it must be added to Article 3(8) Directive so that the instruction is unequivocal: both universally and generally applicable collective agreements shall be extended to posted workers; (ii) currently, collective agreements that are not universally applicable may only apply in the construction sector,⁴⁷² arguably, this is due to the fact that, “The sector that most commonly uses posted workers is construction (25%)”.⁴⁷³ However, this has an unjustified limiting effect, “The political compromise to limit the obligatory part of the PWD to extend collective agreements in the construction sector (see the Annex to the PWD) cannot logically or legally be defended.”⁴⁷⁴ Therefore, this needs to be amended to incorporate all sectors in order to broaden the scope of applicability; (iii) in *Laval*, the Court determined that collective agreements which are not universally applicable need to have been declared in the transposing legislation, but Article 4(3) of the amended Proposal was omitted from the final Directive, thus the Court’s inspiration for this interpretation of Article 3(8) Directive has no legislative support and so this point needs to be amended to clarify that the applicability of collective agreements is not contingent on their declaration in the transposing legislation; and (iv) the requirement that the agreement applies to *all* similar undertakings, indirectly has the effect of introducing a more ‘universal’ requirement and therefore needs to be amended to the ETUC’s insightful suggestion, “a majority of similar undertakings and/or similar workers in the geographical area and in the profession or (part of the) industry concerned”.⁴⁷⁵ This introduces enough flexibility to achieve the applicability of *de facto* collective agreements.

The ETUC suggested a number of amendments to Article 3(8) Directive under Proposal 5 entitled, “Respecting and safeguarding the plurality of industrial relations systems in the Member States” and it is suggested that the title itself should be included in the body of the Directive. The ETUC suggested that as generally applicable collective agreements can only be applied where the Member State does not have a system for declaring collective agreements universally

⁴⁷² Commission Communication COM(2003) 458 final, op. cit., Section 3.1.

⁴⁷³ EUROPA Press Release ‘Q&A – Legislative initiatives on the posting of workers’ 21 March 2012: [http://europa.eu/rapid/press-release MEMO-12-199_en.htm?locale=en](http://europa.eu/rapid/press-release_MEMO-12-199_en.htm?locale=en) [accessed 15 June 2013].

⁴⁷⁴ Houwerzijl, ‘The Posting of Workers Directive: About the Background, Content and Implementation of Directive 96/71/EC’, op. cit., 385.

⁴⁷⁵ Proposal 5, ETUC ‘A Revision of the Posting of Workers Directive: Eight proposals for improvement’, op. cit., 35.

applicable, this can lead to problems in Member States which rely on both types of agreement, such as Germany and Italy. So, to resolve this, the ETUC recommended removing the condition in which there is no system for declaring collective agreements universally applicable so that Member States can apply the universally applicable or generally applicable '*de facto*' collective agreements. This thesis supports this recommendation as it shows a true reflection of the workings of the Member States' labour systems, as opposed to imposing a rigid structure and obliging all of the Member States to substantially adapt their own systems. Also, the amended text should specify that collective agreements made applicable by public procurement law should be accepted, this ETUC suggestion supports the differing methods by which collective agreements become applicable and therefore is a welcome amendment.

In the Andersson Report the European Parliament also advocated that the provision on collective agreements in the Directive must be amended. Arguably, the Draft Report was far more decisive in offering positive solutions as it called on the Commission to review the Directive and consider "the recognition of a wider range of methods of organizing labour markets than those currently covered by Article 3(8)",⁴⁷⁶ whereas the finalised Andersson Report only called for "respect for different labour models".⁴⁷⁷ These can be understood to have the same teleological interpretation, but it is submitted that the literal interpretation of the two can be read differently by the Court; indeed, the Court may well profess that in *Laval* it did show respect for the differing labour models yet did not have the legitimate expression at its disposal to implement a collective agreement that had not been declared as being applicable in the implementing legislation. In the finalised Andersson Report, the Parliament was clearly inciting the Commission to show a greater respect for the differing labour models, however, the Draft Report encouraged consideration of those beyond the limitations of Article 3(8) Directive by using more direct guidance in doing so and it is this definite and certain language that is needed when the issue stems from misinterpretations.

Finally, the academic literature has also advised amending Article 3(8) Directive. Kilpatrick initially opined that the solution to this "regulatory

⁴⁷⁶ European Parliament Draft Report on challenges to collective agreements in the EU of 8 May 2008 (2008/2085(INI)), Point 23.

⁴⁷⁷ 'The Andersson Report', op. cit., Point 30.

conundrum” could be to fully embrace the Court’s “new approach” adopted in the *Laval* Triplet, “It might appear to EU lawyers that there is a straightforward way of resolving the conundrum: simply to dispense with collective standard-setting for posted workers, given its chilling effect on cross-border provision of services.” However, after momentary consideration, Kilpatrick swiftly concluded “that this is profoundly impractical and undesirable, on a number of grounds.”⁴⁷⁸ Kilpatrick set out four reasons that substantiate why collective standard-setting cannot be entirely ousted by statutory standards:

- (1) Practical reasons: “Collective bargaining is quite simply an unavoidable fact of working-life regulation in the Member States of the European Union... over 60 per cent of workers in the European Union are covered by collective bargaining”;⁴⁷⁹
- (2) Democratic reasons: “Collective bargaining promotes workplace democracy by giving workers a voice and this in turn acts as an important bridge or ‘school’ for broader democratic participation.”;⁴⁸⁰
- (3) Compliance with international human rights’ obligations: “Article 11 [ECHR] provides that everyone shall have the right to freedom of association, including the right to form and join trade unions for the protection of their interests. In two recent decisions... [the ECtHR found for the first time] that the right to bargain collectively with the employer has, in principle, become one of the essential elements of the ‘right to form and join trade unions’ protected by Art. 11.”⁴⁸¹ Decisions by the EU institutions which impact upon collective bargaining and action must be taken in compliance with these international human rights’ obligations.”;⁴⁸²

⁴⁷⁸ Kilpatrick, ‘Laval’s regulatory conundrum: collective standard-setting and the Court’s new approach to posted workers’, op. cit., 845.

⁴⁷⁹ Ibid., 860.

⁴⁸⁰ Ibid., 861. In this section Kilpatrick made reference to Alain Supiot’s, ‘Voilà l’économie communiste du marché’ in *Le Monde* (25 January, 2008), “In a provocative commentary in *Le Monde*, Alain Supiot has commented that the decisions in *Viking* and *Laval* are emblematic of a new broader tendency in which democracy is stunted in order to liberalise markets.”

⁴⁸¹ *Demir v Turkey* (2009) 48 E.H.R.R. 54; see also *Enerji Yapi Yol Sen v Turkey* (App. No. 68959/01), nyr, 21 April, 2009.

⁴⁸² Kilpatrick, ‘Laval’s regulatory conundrum: collective standard-setting and the Court’s new approach to posted workers’, op. cit., 861.

- (4) Internal EU constitutional reasons: “In its development the European Union has expressly and increasingly given constitutional support in three different ways to the specially strong tradition of collective bargaining within its constituent states: through development of a social dimension to balance its project of economic liberalisation; through development of a distinctive EU social dialogue to mirror at EU level the traditions of social partnerships in its constituent states; and through respecting as a fundamental right both the *existence* and the *diversity* of collective bargaining in the Member States.”⁴⁸³

This thesis corroborates all of the arguments set out above; collective bargaining is not only a key aspect to the Member States’ individual labour systems but is also a key component to the overall direction and values reflected in the EU. However, Kilpatrick then went on to consider moving whole-heartedly in this direction by implementing that collective bargaining should become the “primary locus of a regulatory solution.”⁴⁸⁴ It is suggested that this route would not be a sensible option as it would ultimately only result in marginalising Member States that do rely on statutory standard setting and this thesis aims to avoid an either/or approach. It is submitted that a greater acceptance and respect for the plurality of industrial relations systems in the Member States can be achieved by amending the Directive to broaden the scope of applying collective agreements.

(ix) Collective Action

Paragraph 22 of the Preamble to the Directive states, “this Directive is without prejudice to the law of the Member States concerning collective action to defend the interests of trades and professions”. This sentiment does not appear in the text of the Directive; only in the Preamble, and given its importance to enforce the application of collective agreements, it needs to be specified in the text that posted workers may undertake collective action to ensure all of the provisions that they are entitled to are guaranteed, especially the more favourable conditions, so as to boost worker protection and equality. However, as well as promoting this

⁴⁸³ Ibid.

⁴⁸⁴ Ibid., 863.

message, should more be done? How far should collective action be protected, especially when considering its special place in accordance with Article 153(5) TFEU?

The ETUC has instructed the European legislator to safeguard the autonomy of the social partners by introducing the ‘Monti Clause’⁴⁸⁵ into the Directive:

“This Directive may not be interpreted as affecting in any way the exercise of fundamental rights as recognised in Member States and in international treaties, including the right or freedom to strike and the right to collective bargaining. These rights may also include the right or freedom to take other actions covered by the specific industrial relations systems in Member States.”⁴⁸⁶

This provision does not regulate the right to strike but expresses its special place within EU law, which is ultimately a necessary element that is missing from the current Directive, especially in light of Article 153(5) TFEU which excludes the right of association and the right to strike from the Union’s competence. However, this provision is not an easy or uncomplicated solution, as collective bargaining and collective action appear to fall within the shared competence of the Union and the Member States, in accordance with Articles 152 and 153(1)(f) TFEU respectively. Therefore, excluding collective bargaining and other forms of collective action would be a very progressive gesture that may ultimately cause unintended results. Also, the Monti Clause originates in Article 2 Monti I Regulation on the functioning of the internal market in relation to the free movement of goods among the Member States. Thus, it is based on the free movement of goods; not workers or services, and it does not focus on industrial action, further, the free movement of goods is still free from horizontal direct effect, unlike the free movement of workers and services. Therefore, the Monti Clause may not be of great assistance to draw upon in this context, as

⁴⁸⁵ The ‘Monti Clause’ refers to Article 2 of the ‘Monti I Regulation’ op. cit., named after its proposer Mario Monti who was the Commissioner for the Internal Market and Services at the time.

⁴⁸⁶ Proposal 2, ETUC ‘A Revision of the Posting of Workers Directive: Eight proposals for improvement’, op. cit., 22.

transplanting a Clause from a Regulation on goods to a Directive based on services, is not the most obvious or coherent solution.

In conclusion, to exclude collective bargaining and action from the reach of the Directive, specifically in this context, may lead to an unbalanced approach in favour of social policies thereby allowing more restrictions to service provision. To be clear, this thesis acknowledges the undue priority that has been granted to service provision in this context, but cannot accept that the solution is to entirely remove one element from the equation and state that it has become ‘untouchable’. Therefore, I am unconvinced by this suggested solution as extracting collective bargaining and action from a Directive that will inevitably encounter industrial action as the predominant obstacle to its equally important objective of service provision goes a step too far.

The ETUC has also suggested adding the Monti Clause to the primary law, “to amend the Treaty in order to introduce a clause that would exclude the right to strike from its scope of application – the so-called ‘social progress clause’.”⁴⁸⁷ This Clause would immunise the right to strike from internal market rules. Considering that the Lisbon Treaty, an amending Treaty, had only recently come into force, it is submitted that a Treaty amendment at this stage was a highly unlikely proposition. Also, it is submitted that even in the long-term such a proposition is unlikely as the Court has maintained that Article 56 TFEU would be deprived of some of its effectiveness if private actors were permitted to act in a way that obstructed service provision.⁴⁸⁸

This thesis accepts that the right to strike cannot be absolutely immune from the laws of the internal market and equally, it is highly unlikely that the Treaty will be amended to provide for such a predicament – it is not a realistic proposition. Ultimately, this thesis emphatically advocates that there cannot be a ‘one-or-the-other’ solution between the internal market and social rights – such a proposal is unfeasible and naïve. What is really needed is the compatibility of both elements and accordingly a greater acceptance of the differing labour systems and equally the economic opportunities of the market; to pit one against

⁴⁸⁷ Report to the Commission, ‘A New Strategy for the Single Market: At the Service of Europe’s Economy and Society’ by Mario Monti (9 May 2010), Section 3.2. Can be accessed here: http://ec.europa.eu/internal_market/strategy/docs/monti_report_final_10_05_2010_en.pdf [accessed 16 January 2013].

⁴⁸⁸ *Laval*, op. cit., [98].

the other, in whichever direction, would only result in a cyclical occurrence of the same fundamental issue whereby the economic and social principles are continuously at loggerheads. Therefore, to truly develop and move forward there absolutely has to be an appreciation of what both sides can, and do, offer. Furthermore, it is a very draconian response to amend the Treaty in the way suggested by the ETUC and it is opined that it is no longer necessitated; if reform had been implemented immediately after the *Laval Triplet* then, from a subjective point of view, that reform should have been substantial: tweaking the Directive and reinstating what is already there would have proved futile. However, since the *Laval Triplet* EU law has moved on and developed, particularly in the context of fundamental rights and social considerations. Therefore, amending the Treaty at this stage is both unnecessary and unrealistic. However, amending the Directive itself to tip the balance towards greater social protection is imperative.

(x) Public Policy

One of the most influential ways that the Directive can support social protection is via Article 3(10) Directive, which has two elements: (i) the Directive will not preclude the application of terms and conditions of employment outside Article 3(1) Directive in the case of public policy provisions; and (ii) the Directive will not preclude the application of collective agreements beyond the construction sector. The second element has already been dealt with above within the sub-heading, ‘Collective Agreements and their Applicability’, therefore, this section will concentrate on the first element. Unfortunately, the Court has effectively “neutered”⁴⁸⁹ this provision⁴⁹⁰ so that unless the public policy objective is tantamount to preventing child labour, only then will it be genuinely considered as a potential justification for restricting the economic freedoms; this provision must be more encompassing and consequently more realistic.

The public policy ground is corroborated by Article 52 TFEU which sets out the Treaty derogation. The derogation in the primary law is available whether the restriction is distinctly or indistinctly applicable, thereby guaranteeing an ever-

⁴⁸⁹ Barnard, ‘Using Procurement Law to Enforce Labour Standards’ in Davidov and Langille (Editors), *The Idea of Labour Law* (2011) OUP, 267.

⁴⁹⁰ Particularly in Case C-319/06 *Commission v Luxembourg*, op. cit.

present justification. As promised in Chapter 1 Part 2, aside from specifically providing solutions to the Directive, a sub-aim of this thesis is to provide an intellectual, valid and robust justification to protecting national interests in the context of posted workers. The national interests have predominantly been voiced in the form of collective action that has opposed unequal conditions, a threat to the employment of host State workers and disruption to the host State's labour market.

Public interest objectives reflect the political, cultural and moral choices of the host State and the Court has recognised that public policies will vary from one Member State to another and from one era to another, hence, competent national authorities must be allowed a margin of discretion, within the limits imposed by the Treaty.⁴⁹¹ The importance of public policies therefore should not be underestimated as they have gradually evolved to become a part of the general *acquis communautaire*, "all the public policies that have been accepted by the Court, in the course of the years, as justifying the creation or preservation of Member State obstacles to trade or mobility (they form a long and open-ended list) may, by logical extension, also form an aim of internal market harmonisation."⁴⁹² Nevertheless, their validity is truly tested in practice and the Court has taken a very firm approach, "the Court has ruled that the concept of public policy must be interpreted strictly and should not be determined unilaterally by each Member State."⁴⁹³ The public policy justification must be reasoned on overriding general interest grounds that presupposes the existence of a genuine and sufficiently serious threat to the fundamental interests of society.⁴⁹⁴ Consequently, the host State's national laws that fall outside of Article 3(1) Directive, and were not intended to be extended to posted workers, are automatically viewed as a restriction to trade and are very much subordinate to the primacy of Article 56 TFEU. However, as those national laws reflect the public interest objectives of the Member State that they were created to protect and represent, they are of fundamental importance and Article 3(10) Directive needs to be bolstered so that it is capable of sufficiently protecting the host State's national laws.

⁴⁹¹ *Omega*, op. cit., [31].

⁴⁹² De Witte, 'Non-market values in internal market legislation', op. cit., 70.

⁴⁹³ Commission Communication COM(2003) 458 final, op. cit., Section 4.1.2.2.

⁴⁹⁴ C-319/06 *Commission v Luxembourg*, op. cit., [50].

It is submitted that the way in which an argument is made will be influential on how it is received by the Court, “rhetorical reordering does influence the reasoning process, both in public debate and in judicial proceedings.”⁴⁹⁵ Therefore, in spite of the evolution of social rights in the Union legal order, “it is asserted that the Court’s machinery operates on the basis of *economic programming*. In other words, claims are more likely to be successful if framed through the economic semantic.”⁴⁹⁶ It is necessary to structure the public policy argument in favour of the objectives of the internal market, but equally, the justification should not be dressed up as something that it is not. The disruption to the host State’s labour market is not caused by posted workers themselves, but by the application and interpretation of the Directive⁴⁹⁷ and this disruption is a genuine and sufficiently serious threat to the fundamental interests of the society in which the posting takes place and the legislator must recognise this issue before a solution can be reached.

László Andor, the Commissioner for Employment, Social Affairs and Inclusion, gave a speech at the Conference on ‘Posting of Workers and Labour Rights’.⁴⁹⁸ A criticism of Andor’s speech would be his lack of judgement concerning one of the causes that triggered this problem area, “The phenomenon is much more widespread and the problems it raises are far from new. And they are not necessarily linked to recent enlargements of the Union. The large case-law on posting dating back to the 1990s makes that clear.” This is a very one-dimensional view presented by the Commissioner; saying that the issues are not linked to the recent enlargements is simply not true – the issues originated in the early case law *because of* EU enlargement at the time and the disparities that it highlighted – *Rush Portuguesa*⁴⁹⁹ is the seminal case on posted workers in which Portuguese workers were posted to France and the Director of the Office national d’immigration in France attempted to impose additional conditions on the

⁴⁹⁵ Chalmers, Davies & Monti, *European Union Law*, op. cit., 813.

⁴⁹⁶ Lecomte, ‘Embedding Employment Rights in Europe’, op. cit., 17.

⁴⁹⁷ In *Laval*, the Swedish trade union was not undertaking collective action because posted workers were working on the site, but because they were subject to unequal conditions under a different collective agreement.

⁴⁹⁸ EUROPA Press Release ‘Mr László ANDOR EU Commissioner for Employment, Social Affairs and Inclusion “Moving forward on the Posting of Workers Directive” Conference on Posting of Workers and Labour Rights Oviedo, 17 March 2010’: http://europa.eu/rapid/press-release_SPEECH-10-100_en.htm [accessed 16 May 2013].

⁴⁹⁹ *Rush Portuguesa*, op. cit.

Portuguese workforce due to the fact that Portugal had only just acceded to the EU in 1986 and the French Government feared an influx of cheaper labour coming from Portugal. The most prevalent posting cases concerned posted workers specifically from new accession States, “It should be remembered that *Rush Portuguesa* as well as *Viking*, *Laval* and *Rüffert*, all concerned EU citizens, but at a time when their individual right of free movement were suspended by virtue of a transitional period.”⁵⁰⁰ Accordingly, European enlargement exacerbates the issues of the Directive as posted workers bring their own wage and labour conditions with them and along with this the threat of social dumping and lowering employment conditions. Therefore, to purport that the issues are not necessarily linked to recent enlargements of the Union creates a false impression of why the Directive was called for in the very beginning; to create a climate of fair competition and therefore avoid undercutting the host State due to differing labour standards across the Union.

However, it is also important to recognise, in order to appreciate the whole picture, that these differing labour standards are the very reason that make posted workers so attractive to contractors as they present a commercial advantage that is not available in the host State, which in turn presents greater opportunities to service providers and the functioning of the internal market. Therefore, in finding a solution to the Directive, there is something to be said for ‘unequal conditions’. The commercial gain and ability to fill skills shortages in Member States are the ‘Unique Selling Points’ of posted workers, thus, wage differences highlight the importance, and need, of posting. Nevertheless, this thesis maintains that equality should be the aim in order to fulfil the well-established principle that the internal market should not aspire to low standards.

The Commission’s Communication provides the following guidance on implementing public policy objectives, “the concept of ‘public policy provisions’ referred to in Article 3(10) covers provisions concerning fundamental rights and freedoms as laid down by the law of the Member State concerned and/or by international law, such as freedom of association and collective bargaining, prohibition of forced labour, the principle of non-discrimination and elimination

⁵⁰⁰ Hatzopoulos, ‘Liberalising trade in services: creating new migration opportunities?’, op. cit., footnote 71.

of exploitative forms of child labour,⁵⁰¹ data protection and the right to privacy.”⁵⁰² Therefore, the freedom of association and collective bargaining have been identified by the Commission as coming within Article 3(10) Directive, as corroborated by the ILO Convention. Combined with the fact that, in *Laval*, AG Mengozzi included “the fight against social dumping”⁵⁰³ as a legitimate public interest objective and the Court stated that “the right to take collective action for the protection of the workers of the host State against possible social dumping may constitute an overriding reason of public interest within the meaning of the case-law of the Court”.⁵⁰⁴ The impetus is there, but it is still very sensitive ground as this potential justification can so easily be written-off as being disproportionate. If the posted workers had undertaken collective action in *Laval* to demand the more favourable terms, the result may have been different as that would have been a more outward representation of worker protection, but as it came from the host State workers it could be seen as pertaining to national protectionism. The Court *must* recognise that undertaking collective action against social dumping is not a form of protectionism and this can be achieved by the Commission acknowledging the reality of the cause of the issues presented by the Directive and amending the legislation accordingly.

The protection of workers, which is an objective of the Directive, is a well-established overriding reason of public interest capable of restricting service provision, as evidenced by the case law.⁵⁰⁵ This is such a highly-important objective that it provides some scope to include other public interest objectives by proxy. In *Wolff & Müller*⁵⁰⁶ the Court did not preclude the national law which provides that the service recipient is liable as guarantor as it was recognised that the minimum rate of pay guaranteed to posted workers constitutes a feature of worker protection, thus, procedural arrangements must ensure the observance of that right. The objective of implementing liability as guarantor in the national law was specified as follows, “the explanatory memorandum to the legislation states that the objective of liability as guarantor is to make it more difficult to award

⁵⁰¹ The right to organise and collective bargaining are dealt with in ILO Conventions 87 and 98. Conventions 29 and 105 cover the prohibition of forced labour, while Convention 111 establishes the principle of non-discrimination. Convention 182 covers the worst forms of child labour.

⁵⁰² Commission Communication COM(2003) 458 final, op. cit., Section 4.1.2.2.

⁵⁰³ AG Opinion *Laval*, op. cit., [309].

⁵⁰⁴ *Laval*, op. cit., [103].

⁵⁰⁵ *Viking*, [77]; *Laval*, [103], op. cit.

⁵⁰⁶ *Wolff & Müller*, op. cit.

contracts to subcontractors from so-called cheap-wage countries so as thereby to revive the German labour market in the construction sector, protect the economic existence of small and medium-sized establishments in Germany and combat unemployment in Germany.”⁵⁰⁷ This suggests that the potential scope for a public policy justification could extend to combating unemployment and thereby protecting the labour market. However, before getting too enthusiastic about this ruling, it is important to bear in mind that the protection of workers is a well-established public interest objective by the Court, but the protection of the domestic labour market is not. In *Wolff & Müller*, the Court did not state that the protection of the domestic labour market is now recognised as a valid justification for restricting the provision of services, but if liability as guarantor robustly protects workers and an ancillary objective of liability as guarantor is to protect the domestic market, the Court will seemingly be more lenient to the spill-over effect of the national measure. The only difficulty with this solution is that the protection of the labour market and combating unemployment as justifications to the restriction of trade may only be activated where there is a well-established public policy objective at stake; such as the protection of workers.

Another objective of the Directive is the prevention of unfair competition, which was also protected as a corollary of worker protection in *Wolff & Müller* by guaranteeing the minimum wage, “Inasmuch as one of the objectives pursued by the national legislature is to prevent unfair competition on the part of undertakings paying their workers at a rate less than the minimum rate of pay... such an objective may be taken into consideration as an overriding requirement capable of justifying a restriction on freedom to provide services”.⁵⁰⁸ It is interesting to consider how far this principle can be stretched. For example, can it extend to preventing unfair competition on the part of undertakings paying their workers less than the ‘going rate’? The answer to this is simple – not unless the going rate is provided for in the legislation.

In conclusion, the protection of the domestic labour market against social dumping in an enlarging Union is unlikely ever to become a genuine public policy justification for three reasons: (i) it is not a constant provision such as the protection of workers but relates to fluctuations in the labour market; (ii)

⁵⁰⁷ Ibid., [18].

⁵⁰⁸ Ibid., [41].

protection of the domestic market is too obviously compatible with national protectionism which has no place in the internal market; and (iii) it has been established by the case law⁵⁰⁹ that economic grounds, such as considerations linked to the employment market, cannot be relied upon to justify a restriction on the freedom to provide services.

However, there may be an additional avenue by which public policy objectives can be incorporated into the context of posted workers. There is currently no provision for public procurement in the Directive which is unfortunate as it can be used to implement social requirements into the contract, “The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.”⁵¹⁰ That is why it is of particular concern that the Court did not make any mention of public procurement in *Rüffert*,⁵¹¹ despite it being one of the main features of the case, “The fact that it is an important issue of public policy to give special protection to workers on public procurement, which is internationally accepted in the International Labour Organisation and also at EU level in the legal framework of public procurement, has completely escaped the Court.”⁵¹² As there is no reference to the public procurement Directives in the Directive,⁵¹³ as seen in *Rüffert*, any additional requirements will not be allowed as they are not part of the mandatory rules laid down in the Directive. The interface between the posting of workers and public procurement needs to be rectified,⁵¹⁴ in order to confirm the connection between social clauses as provided for in public procurement contracts and the Directive, this thesis proposes making a direct reference to the public procurement Directives⁵¹⁵ under Article 3(10) Directive.

In Chapter 2, the possibility of including local hiring clauses (particularly at times of recession when local unemployment is at its highest) in public

⁵⁰⁹ *Finalarte*, [39]; *Portugaia*, [26], op. cit.

⁵¹⁰ Directive 2004/18/EC, op. cit., Article 26.

⁵¹¹ *Rüffert*, op. cit.

⁵¹² ETUC ‘A Revision of the Posting of Workers Directive: Eight proposals for improvement’, op. cit., 39.

⁵¹³ Directive 2004/18/EC, Preamble [34], on general public procurement does however refer directly to the Posted Workers Directive.

⁵¹⁴ Kilpatrick, ‘Internal Market Architecture and the Accommodation of Labour Rights: As Good as it Gets?’ (2011) EUI Working Paper Law 2011/04, 20.

⁵¹⁵ Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, [2004] OJ L 134/1; and Directive 2004/18/EC, op. cit.

procurement contracts was, in general, concluded as being incompatible with Union law because of its discriminatory effect. However, if argued carefully, there is room for social requirements in public procurement that are not limited to *local labour*, such as using ‘long-term unemployed’ workers. This has been a possibility since 1988, as created by the case law, “the condition relating to the employment of long-term unemployed persons is compatible with the [public procurement] directive if it has no direct or indirect discriminatory effect on tenderers from other Member States of the Community.”⁵¹⁶ Barnard advocated⁵¹⁷ the more balanced stance taken in *Commission v Germany (occupational pensions)* between economic and social interests. The case showed mileage in terms of public procurement influencing which workers may be selected for the relevant work, “Nor can application of the procurement procedures preclude the call for tenders from imposing upon interested tenderers conditions reflecting the interests of the workers concerned.”⁵¹⁸ Using this to the host State workers’ advantage, whilst remaining in-keeping with EU law, would obviously take a confident and creative argument. Such an argument does not come easily or naturally as it attempts to harmonise two polarised policies, yet the case law, from *Beentjes* in 1988 to *Commission v Germany* in 2010, has certainly showed moments of promise, “Essentially, the Court’s argument is that the [public procurement] Directives apply as a result of the fact that it is possible to accommodate the various social objectives of the national scheme with the Directives.”⁵¹⁹

To build on this promise, the use of SMEs (small and medium enterprises) has the potential to take a greater role in public procurement and hiring local workers. For example, if there is a large building project, such as a bridge in the United Kingdom, that project will most likely need to employ a large company in order to fulfil the task, however, there will be smaller jobs, such as the use of electricians, and these subcontracts may be awarded to local SMEs. It makes greater commercial sense to employ local workers who do not have the ‘hidden costs’ associated with posted workers, such as travel and accommodation. The use

⁵¹⁶ Case 31/87 *Gebroeders Beentjes BV v State of the Netherlands* [1988] ECR 4635, [37(iii)].

⁵¹⁷ Barnard, ‘Using Procurement Law to Enforce Labour Standards’, op. cit., 264-267.

⁵¹⁸ C-271/08 *Commission v Germany* [2010] ECR I-7091, [56].

⁵¹⁹ Syrpis, ‘Reconciling economic freedoms and social rights – the potential of *Commission v Germany* (case C-271/08, judgment of 15 July 2010)’ (2011) ILJ, 40(2): 222-229, 224.

of local workers cannot be solely justified by ‘greater commercial sense’ as that would pertain to a purely economic reasoning, which is not accepted as a public interest objective by the Court. However, the Communication from the Commission that sets out the Europe 2020 strategy for smart, sustainable and inclusive growth, repeatedly endorses the use of SMEs.⁵²⁰ Accordingly, by adopting the language and aims of the Commission as one of its social considerations to encourage the involvement of SMEs, there will be a greater scope to make use of SMEs in the procurement process and therefore potential to incorporate use of local companies and consequently local labour. The justification for such action can rely on the Commission’s Communication, thereby meeting the interests of both the Union and the national labour market.

The public policy justification that this thesis has promised therefore needs to be a sophisticated and tactful argument that carefully selects its objective in order to truly reflect the reality and also consider how this will be read by the Court. The most viable justification is likely to be on the basis of avoiding social tensions that are caused by the market. Surely, the Court cannot rule that “social tensions” comprise an “economic aim”. The most prominent social tension is demonstrated by the timeless issue of social dumping; from the Directive’s origins to future cases in which there will no doubt always be an availability of cheaper labour from elsewhere, this is the crux of the matter. Preventing social tensions is also in line with the ETUC’s suggestion of adding ‘social policy provisions’ to the concept of public policy. The ETUC suggested that the social and public policy provisions should include “provisions which are appropriate to the attainment of the protection of workers, equal treatment, the prevention of social dumping, or fair competition”.⁵²¹

This thesis has endorsed that “at least the minimum rate of pay” is extended to posted workers in favour of the service provider, as well as recommending that the favourability provision is bolstered and ensured by respecting the fundamental right to undertake collective action in favour of

⁵²⁰ This includes Section 2 under “Sustainable growth – promoting a more resource efficient, greener and more competitive economy” and the “Flagship Initiative: ‘An industrial policy for the globalisation era’” and Section 3 under “Missing Links and Bottlenecks”, Communication from the Commission, ‘EUROPE 2020: A strategy for smart, sustainable and inclusive growth’ COM(2010) 2020 final.

⁵²¹ Proposal 7, ETUC ‘A Revision of the Posting of Workers Directive: Eight proposals for improvement’, op. cit., 42.

granting higher labour standards for the protection of workers' rights and therefore the final objective of ensuring fair competition must be met by guaranteeing that the host State can apply conditions to posted workers that it has identified as fulfilling public interest objectives.

(xi) Monitoring Compliance with the Directive

Article 4 Directive provides for cooperation on information and Article 5 Directive provides for measures to be taken in the event of failure to comply with the Directive, which have been interpreted stringently by the Court to the extent that reasonable measures are ruled as being disproportionate in meeting their objectives. This unduly diminishes respect for the Directive's objectives, particularly the protection of workers.

It is intended that a combination of all of the amendments outlined above should contribute to boosting the cooperation on information and as for the most effective measures, the ETUC's final proposal entitled, "Securing effective enforcement" is one of the most substantive. The ETUC suggested amending Article 5 Directive to include sanctions that are both effective and dissuasive and the ETUC has proposed a joint and several liability system for the recovery of pay, damages and fines, which it specifies is imperative in light of the increasing use of subcontracting across the Union, "By creating extremely complex networks of subcontractors, main contractors can create easy ways to circumvent legal or collectively agreed labour standards and working conditions."⁵²² Article 5 Directive currently does not include any concrete measures in the event of failure to comply with the Directive, "This is definitely a lost opportunity: at least the responsibility – or better still liability – of the service provider and the receiver of the service for the payment of wages and other employment conditions of the posted workers should have been included."⁵²³ As the application of joint and several liability has already been accepted by the Court *de facto* by Article 5 Directive in *Wolff & Müller*,⁵²⁴ it is suggested that a provision on joint and several liability should be included into the text of Article 5 Directive. The ETUC has

⁵²² Ibid., Proposal 8, 43.

⁵²³ Houwerzijl, 'The Posting of Workers Directive: About the Background, Content and Implementation of Directive 96/71/EC', op. cit., 386.

⁵²⁴ *Wolff & Müller*, op. cit.

also proposed adding a new section to Article 5 Directive which entitles the host State to require a copy of the E101 form, the employment contract, timesheets, payslips, health and safety risk assessment, a representative of the service provider present on the territory of the host State and where the worker is a third country national, copies of the work and residence permits. Further to this, the host State can require that these documents are available without delay during the period of posting and the host State can require a prior notification of posting. Finally, the ETUC has suggested the use of ‘designated representatives’ in order to sufficiently facilitate complaints.

It is clear that if all of these conditions were made applicable the chance of a fraudulent use of the Directive would be virtually extinguished, however, it can also be argued that the administrative and financial burden that so many requirements would impose on the service provider would also virtually extinguish any service provider from wanting to post their workers! Furthermore, “SMEs and micro-businesses are especially affected by administrative requirements”,⁵²⁵ therefore, it is these smaller businesses that would be most ‘hard hit’ by the ETUC’s proposed requirements which would in turn negatively affect the employment opportunities of workers in the Union. Of course, the Directive needs to be amended to increase the protection of workers, however, it would appear that the ETUC has included every single possible obligation on a service provider that is available. Much of the documents listed above have been the cause of potential obstacles to service provision in the case law and although the intention is that the documents are made available for inspection so as to ensure compliance with the Directive and therefore guaranteeing worker protection, in general, the Court has ruled that such requirements restrict Article 56 TFEU. However, this was not always the case; in *Commission v Germany*⁵²⁶ the obligation on the service provider to translate into German the documents that were to be kept on site during the posting, including the employment contract, pay slips, time sheets and proof of payment of wages, was held as being justified in accordance with Article 4 Directive on the ‘Cooperation on information’ and as the documents were relatively short they did not impose a disproportionate financial or administrative burden on the service provider in order to achieve the

⁵²⁵ Proposed Enforcement Directive COM(2012) 131 final, Section 2.2.

⁵²⁶ C-490/04 *Commission v Germany*, op. cit.

objective of the social protection of workers and the monitoring of that protection. This suggests that the ETUC's proposal is somewhat superfluous, but it must be appreciated, if the ETUC does not propose such obligations on the service provider, then who will? The ETUC should be the body that workers can rely on in order to continuously campaign for their protection.

It is apparent that the ETUC has suggested as much as it can without proposing an entirely new directive which suggests that the ETUC approves of the Directive's original objectives but not its execution. This thesis recognises that change is necessary, which is in stark contradiction to the other European social partner BusinessEurope, that has expressed the Directive does not need amending, "Employers do not agree with the trade unions that the Posting of Workers Directive should be revised."⁵²⁷ However, some of the amendments suggested by the ETUC do go too far.

In order to achieve a true social market economy, what is needed is a greater balancing of all of the Directive's objectives and not a pendulum approach that will only ever be capable of appeasing one side at a time. Accordingly, this thesis suggests that the four documents approved in *Commission v Germany*, as set out above, should be provided by the service provider, as they have already been accepted by the Court as being justified. This needs to be included in a non-exhaustive list under Article 4 Directive to avoid the Court being too limiting in its interpretation. In order to ensure legality and compliance,⁵²⁸ this thesis also endorses requesting copies of third country national posted workers' work and residence permits to confirm their lawful and habitual employment.⁵²⁹ Finally, as there is currently no formal system of registration of posted workers, which leads to a lack of necessary and precise information, the use of a prior declaration is an appropriate national control measure and it is less restrictive than prior authorisation.⁵³⁰ The prior declaration should include how many workers will be

⁵²⁷ BUSINESSEUROPE 'Spanish Presidency Conference on "Posting of Workers and Labour Rights", Oviedo, 17-18 March 2010': <http://www.besbusiness.eu/DocShareNoFrame/docs/1/DECLMBICNHBCGJAFDKDANKPOPDWD9DB3TW9LTE4Q/UNICE/docs/DLS/2010-00778-E.pdf> [accessed 4 June 2013], 2.

⁵²⁸ See generally discussion of *Rising Sun* [2009] EWHC 35 (Admin) in Chapter 2.

⁵²⁹ *Vander Elst*, op. cit.

⁵³⁰ Furthermore, it is already provided for under Commission Communication COM(2006) 159 final, Section 2.1.(c), which states that, "Almost half the Member States require service providers which post workers to their territory to submit a prior declaration to their authorities."

posted,⁵³¹ the type of service that will be provided, the location and duration of the posting and any changes therein need to be added.

Aside from these additional national control measures imposed on the service provider, it is essential, in the interests of a well-functioning Directive, that the competent authorities in the host and home States improve their cooperation on information, “Most liaison offices in the Member States seem to suffer from understaffing and lack of adequate information. Alarming, these liaison offices scarcely receive requests for information from service providers or workers. The mutual cooperation among liaison offices needs improvement” and finally, Houwerzijl identified that, “One of the complications for direct communication is the language problem.”⁵³² Therefore, it is suggested that the liaison offices could be improved by making use of the Internal Market Information System (IMI), which is also suggested by the Commission in the proposed Enforcement Directive.⁵³³ The IMI is an online tool that assists national, regional and local authorities to cooperate with their counterparts across borders and as it is comprised of a multilingual directory of authorities it works with pre-translated questions and answers, thereby reducing the need for translation of correspondence and documents, which would assist with the language problem.⁵³⁴

(xii) Interim Conclusion

Solution Number One, which is the favoured solution of this thesis as it can directly respond to the identified issues, is to amend the Directive. Eleven amendments have been discussed, both my own and those of the European social partners, the EU Institutions and the academic doctrine. A summary of the amendments is presented below:

⁵³¹ This will consist of a number; no names are to be included as revealing the posted workers' identity could be problematic, as identified by the AG Opinion C-490/04 *Commission v Germany*, op. cit., [93]. Also, it could constitute an infringement of Article 8 Charter on the protection of personal data.

⁵³² Houwerzijl, ‘Towards a more effective posting directive’, op. cit., 194.

⁵³³ Proposed Enforcement Directive COM(2012) 131 final, op. cit., Article 18.

⁵³⁴ The IMI Regulation provides that the Commission is responsible for providing the multilingual system that includes existing translation functionalities: Article 8(1)(b), Regulation (EU) No. 1024/2012 of the European Parliament and of the Council of 25 October 2012 on administrative cooperation through the Internal Market Information System and repealing Commission Decision 2008/49/EC (‘the IMI Regulation’), [2012] OJ L316/1.

- (i) *Should the Directive become a Regulation?*: No, a directive is a more appropriate legislative instrument;
- (ii) *Legal Basis*: From the current legal basis Article 62 TFEU on services should be maintained as it supports one of the Directive's main objectives, whereas Article 53(1) TFEU on establishment should be removed as it implies too much permanence to these temporary workers. Articles 153 and 45 TFEU should be added in order to provide practical, as opposed to merely theoretical, support to social rights and worker protection;
- (iii) *Defining the Directive's Scope*: Article 1(3) Directive needs to be amended so as to deter potential letter-box companies by specifying that the service provider and recipient must be genuinely established in the home and host States respectively, thus, the posting of workers involves a genuine cross-border economic activity;
- (iv) *Defining a Posted Worker*: Article 2 Directive needs to be clarified so that the notion of temporary cannot be abused; the "limited period" should be defined as twenty-four months, as inspired by the time limit specified by Regulation 883/2004 on the coordination of social security systems. This period may be extended, provided that the Commission is informed, as inspired by the transitional period;
- (v) *Clarity of Terms and Conditions of Employment*: The terms and conditions of employment under Article 3(1) Directive must be set out by the Member States precisely and in an easily accessible format, for example this may be done electronically, to improve worker protection and legal certainty;
- (vi) *Minimum Rate of Pay*: Article 3(1)(c) Directive needs to be amended to provide *at least* the minimum rate of pay and, ideally, the going rate, in order to guarantee a greater scope for equality. However, this thesis does not fully endorse the prevailing rate of pay as it is not always clear which pay rate prevails, therefore, reinforcing the minimum character of the Directive will provide greater certainty and establish it as a minimum, not a maximum, Directive for the Court's interpretation.

The fact that this thesis has endorsed "at least the minimum rate of pay" as opposed to the going rate, is in itself some form of compromise, therefore, it is conditional on the following two points: (i) Article 3(2-5) Directive needs to be amended so that the conditions stipulated under Article 3(1) Directive apply to all

workers from day one of the period of posting, irrespective of the total length of the posting; and (ii) the possibility to negotiate and fight for more favourable terms and conditions of employment, beyond the minimum, under Article 3(7) Directive must be ensured;

(vii) *More Favourable Terms and Conditions of Employment*: Article 3(7) Directive needs to be amended to create a genuine possibility of attaining more favourable conditions of employment for the workers. In particular, this must include the more favourable terms and conditions of employment of the host State, as well as the home State, and collective action may be undertaken to ensure this provision in order to truly boost the protection of workers and the scope for greater equality;

(viii) *Collective Agreements and their Applicability*: Article 3(1) Directive needs to be amended to provide that the terms and conditions of employment to be extended to posted workers are to be laid down by law, regulation or administrative provision and/or by collective agreements and these can be extended to posted workers in all sectors, not just construction. Article 3(8) Directive needs to be amended to expand on the definition of collective agreements to include both universally applicable and generally applicable collective agreements in equal measure. Collective agreements do not need to have been declared in the transposing legislation in order to apply. Collective agreements that are not universally applicable, merely need to apply to “a majority of similar undertakings and/or similar workers in the geographical area and in the profession or (part of the) industry concerned”⁵³⁵ as this definition is sufficient in ensuring the general significance of the agreement yet also broad enough to incorporate a wider scope of the types of collective agreement that can apply to posted workers. Accordingly, the second limb of Article 3(8) Directive which states that, “collective agreements which have been concluded by the most representative employers’ and labour organizations at national level and which are applied throughout national territory” may be omitted.

The amended text should specify that collective agreements made applicable by public procurement law should be accepted, as inspired by the ETUC’s suggestion. Finally, in order to ensure a more flexible and practicable

⁵³⁵ Proposal 5, ETUC ‘A Revision of the Posting of Workers Directive: Eight proposals for improvement’, op. cit., 35.

interpretation from the Court, the following sentiment needs to be added to Article 3(8) Directive, “This Directive respects and safeguards the plurality of industrial relations systems in the Member States.”,⁵³⁶

(ix) *Collective Action*: The only guidance on the implementation of collective action can currently be found in paragraph 22 of the Preamble, “this Directive is without prejudice to the law of the Member States concerning collective action to defend the interests of trades and professions”. This needs to be included in the Directive, preferably following on from Article 3(8) Directive on collective agreements under a new Article 3(9) Directive. Added to this should be the ETUC’s suggestion that posted workers shall not be used to replace workers on strike.⁵³⁷ However, the ETUC’s suggestion of including the Monti Clause into the Directive is not supported by this thesis;

(x) *Public Policy*: As aforementioned, excluding collective bargaining and action entirely from the Directive would create an artificial context of posting workers, whereas, granting greater strength to the social interests from the text of the Directive itself would more suitably rectify the balance. The compatibility of public procurement and the Directive would suitably bolster the recognition of social clauses, thus, Article 3(10) Directive needs to include a reference to the public procurement Directives 2004/17/EC and 2004/18/EC in order to specify that public contracts can include matters beyond those referred to in Article 3(1) Directive in the interests of public policy.

The only drawback to including public procurement as a method of implementation in the Directive is that only public contracts would be covered, therefore, private postings could not rely on the additional social clauses in this context. Accordingly, one option is that “private contracting authorities might also argue that a requirement to respect host state labour standards reflects a commitment to corporate social responsibility (CSR)”.⁵³⁸ Also, Article 3(10) Directive needs to be amended further to be more inclusive by including both social policy and public policy provisions and these need to be explicitly identified as including (in a non-exhaustive list) the provisions identified by the

⁵³⁶ As inspired by Proposal 5, *ibid.*, 34.

⁵³⁷ *Ibid.*, Proposal 2, 22.

⁵³⁸ Barnard, ‘Using Procurement Law to Enforce Labour Standards’, *op. cit.*, 270.

Commission's Communication.⁵³⁹ The direct instruction from the Commission's Communication to the host State's fundamental rights and freedoms should satisfy protection of their public interest objectives and the reference to the ILO Convention should suitably bolster the freedom of association and collective bargaining. Added to this should be the protection of workers, fair competition, equal treatment and the prevention of social dumping. The former two provisions meet the Directive's objectives, equal treatment is a general principle of Union law and including the prevention of social dumping is necessary as it is the greatest source of social tension in the context of posted workers, which has already been recognised by the Court and AG Mengozzi as a legitimate public interest objective. In fact, it is proposed that the wording of paragraph 8 of the Preamble to the proposed Monti II Regulation should be applied to Article 3(10) Directive, "The protection of workers, in particular their social protection and the protection of their rights against social dumping, as well as the desire to avoid disturbances on the labour market have been recognised as constituting overriding reasons of general interest justifying restriction of the exercise of one of the fundamental freedoms of Union law."⁵⁴⁰ The implementation of this provision is somewhat of a tactical manoeuvre as it confirms, from the Commission itself, that these elements are recognised as public policy objectives that are in accordance with the objectives of the internal market. Accordingly, the emphasis of Article 3(10) Directive must be on avoiding social tensions, but there is to be no mention of directly protecting the host State's labour market as that would pertain to protectionism and therefore should be avoided in case of misapplication and abuse of such a provision, bearing in mind that the provision of services must equally be maintained;

(xi) *Monitoring Compliance with the Directive:* As inspired by *Commission v Germany*,⁵⁴¹ the documents to be kept on site during the posting should include the employment contract, pay slips, time sheets and proof of payment of wages. This needs to be included in a non-exhaustive list under Article 4 Directive so that service providers and recipients have the flexibility of

⁵³⁹ Commission Communication COM(2003) 458 final, op. cit., Section 4.1.2.2.

⁵⁴⁰ European Commission, 'Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services' COM(2012) 130 final, Preamble [8].

⁵⁴¹ C-490/04 *Commission v Germany*, op. cit.

requesting additional documents in each specific case. As aforementioned, the ETUC's proposal on this point goes too far and unduly burdens the service provider, however, there are two further requirements that should be imposed on the service provider, namely: (i) the provision of a prior declaration of posting including the number of workers that will be posted, the type of service that will be provided, the location and duration of the posting and any changes therein need to be added;⁵⁴² and (ii) in the case of third country national posted workers, copies of their work and residence permits.⁵⁴³ The final amendment to Article 4 Directive that this thesis deems necessary is the requirement that liaison offices improve their cooperation on information by making use of the IMI system. Finally, Article 5 Directive currently does not include any concrete measures in the event of failure to comply with the Directive and therefore needs to be amended to include a provision on the application of joint and several liability.

III. Solution Number Two: Adopt the Enforcement Directive

This thesis has so far proposed amending the Directive itself, however, the Commission has published a legislative initiative in the form of an Enforcement Directive.⁵⁴⁴ The proposal was published on 21 March 2012, as a legislative package, along with the Monti II Regulation.⁵⁴⁵ Solution Number Two analyses the potential of the Commission's proposals and both will be discussed separately in turn, with a stronger emphasis on the proposed Enforcement Directive as that has greater relevance to this thesis.

(i) Lead Up to the Legislative Initiative

⁵⁴² This is already required by half the Member States and provided for under Section 2.1.(c), COM(2006) 159 final, yet in spite of this, it was not acknowledged by the Court in C-490/04 *Commission v Germany*. However, recently in Case C-515/08 *Vitor Manuel dos Santos Palhota and Others* [2010] ECR I-9133, [54] stated, "a prior declaration requirement remains an appropriate measure for enabling the necessary checks to be carried out and preventing fraud". Therefore, this requirement needs to be added to the text of the Directive to avoid future misunderstandings.

⁵⁴³ This should ensure the third country workers are lawfully and habitually employed in the home State without imposing an unduly burdensome obligation on the service provider such as proving the third country workers have been employed for a certain period of time with the service provider, as seen in C-168/04 *Commission v Austria*, op. cit.

⁵⁴⁴ Proposed Enforcement Directive COM(2012) 131 final, op. cit.

⁵⁴⁵ Proposed Monti II Regulation COM(2012) 130 final, op. cit.

The *Laval* Triplet showed the issues of the Directive at their peak and accordingly highlighted the need for change. From the final judgment in this group of cases on 19 June 2008, it took nearly four years for the Commission to finally propose its solution. As the “long wait”⁵⁴⁶ ensued it was not clear whether the delay was emblematic of a lack of political will or that the legislator simply did not know what was the best solution. The European Parliament made the first move for change by encouraging the Commission to review the Directive⁵⁴⁷ to which the Commission responded with its somewhat lacklustre Decision on setting up the Committee of Experts on Posting of Workers.⁵⁴⁸ Then President Barroso made a promise to the European Parliament to propose amending the Directive, which was necessary in order to commit the Commission to making a change.

On 27 October 2010 the Commission finally committed itself to adopting a legislative proposal for the Directive and it was now apparent that this would not entail a revision of the original Directive but would constitute another legal act aimed at improving the implementation of the Directive,⁵⁴⁹ “The result of this clarification should show if a revision of the Posting of Workers directive is needed.”⁵⁵⁰ This indicates a very roundabout, and potentially long-winded, approach of instigating change; this long-awaited Commission proposal is intended merely to ‘test the waters’ to see if the original Directive needs amending. It is hoped that the proposal will sufficiently improve its implementation so as to avoid a complete lack of confidence in respect of this Directive.

On 27 and 28 June 2011 the DG for Employment, Social Affairs and Inclusion of the Commission held a Conference in Brussels on ‘Fundamental Social Rights and the Posting of Workers in the Framework of the Single

⁵⁴⁶ Arnholtz, ‘Slowing down Social Europe? The role of coalitions and decision-making arenas’ (May 2012) Department of Sociology, University of Copenhagen, FAOS Research Paper 125: Report 4 – the posting of workers issue, 53.

⁵⁴⁷ ‘The Andersson Report’, op. cit.

⁵⁴⁸ Commission Decision on setting up the Committee of Experts on Posting of Workers of 19 December 2008, OJ L8/26.

⁵⁴⁹ Commission Communication, ‘Towards a Single Market Act – For a highly competitive social market economy – 50 proposals for improving our work, business and exchanges with one another’ COM(2010) 608 final, Proposal 30. This was confirmed by the tenth of twelve levers in the communication from the Commission, ‘Single Market Act – Twelve levers to boost growth and strengthen confidence – “Working together to create new growth”’ COM(2011) 206 final.

⁵⁵⁰ Opinion of the European Economic and Social Committee on the, ‘Communication from the Commission, “Towards a Single Market Act – For a highly competitive social market economy – 50 proposals for improving our work, business and exchanges with one another” COM(2010) 608 final’ 15 March 2011, INT/548, Section 2.10.

Market’.⁵⁵¹ The Conference was concluded by a Roundtable discussion entitled “Future action and priorities”⁵⁵² in which Philippe de Buck, Director General of BusinessEurope, made some very interesting points. On the proposed Monti II Regulation, De Buck opined, “ETUC believes that the ECJ rulings have undermined workers’ right to take collective action. We do not agree with this interpretation, rather the reverse! Why? Because the real novelty of the *Viking* and *Laval* rulings is that the right to strike has been recognised by the ECJ as an EU fundamental right for the first time.” Unfortunately, I was not present at the Conference and therefore was unable to witness the reaction of the ETUC to this comment; to imply that the *Viking* and *Laval* judgments were a step forward for the right to strike is certainly a different interpretation of the judgments! However, if considered carefully, there must be some truth to this; never before has the issue of the place of social rights been so well-documented and discussed as it has been since these judgments. In some respect, therefore, the case law was responsible for raising this issue and pushing it to the forefront of the political sphere so that now there are conferences, such as this one, dedicated to the topic. On the issue of posted workers, De Buck reiterated an aspect that has been stated before by BusinessEurope, “Posting is and remains a limited phenomenon on European labour markets.” However, the implication that it does not affect the majority of the labour market and therefore is a less relevant issue for the EU at large was set aside by De Buck who clarified that, “due to the high concentration of posting in some countries and sectors, its incidence can be much more significant in selected cases.” Furthermore, it has been established that every year around one million workers in the EU are posted from their home State to a host State⁵⁵³ and it is submitted that this figure is substantial enough to warrant an interest in improving the area.

⁵⁵¹ European Commission ‘Conference on Fundamental Social Rights and the Posting of Workers in the Framework of the Single Market’ 27-28 June 2011: <http://ec.europa.eu/social/main.jsp?langId=en&catId=88&eventsId=347&furtherEvents=yes> [accessed 13 June 2013].

⁵⁵² European Commission ‘Conference on Fundamental Social Rights and the Posting of Workers in the Framework of the Single Market: Conference Documents’ 27-28 June 2011: <http://ec.europa.eu/social/main.jsp?catId=88&langId=en&eventsId=347&moreDocuments=yes&tableName=events> [accessed 13 June 2013].

⁵⁵³ EUROPA Press Release ‘Mr. László ANDOR EU Commissioner responsible for Employment, Social Affairs and Inclusion “Balancing economic integration and social protection” Conference on Fundamental Social Rights and the Posting of Workers in the framework of the Single Market Brussels, 27 June 2011’: http://europa.eu/rapid/press-release_SPEECH-11-478_en.htm?locale=en [accessed 13 June 2013].

To date, the Council has not officially expressed its position following the *Laval Triplet* and out of all the Member States, only Luxembourg in 2008 has demanded the re-opening of the Directive, in fact, certain Member States (Denmark, Sweden, Luxembourg and Germany) have amended their legislation in order to comply with the rulings.⁵⁵⁴

The Commission's legislative solution was expected in the fourth quarter of 2011,⁵⁵⁵ but it was not until 2012 that the proposal was published. The apparent urgency on publishing the proposal in 2012 could, in part, be attributed to the Danish Government, that held the Presidency of the European Council for the first six months of 2012, and stated that during its term the issue of posted workers would be placed at the top of its list of priorities.⁵⁵⁶ At last, the legislative proposal was published and the "long wait" was finally over on 21 March 2012. The delay and postponements were partly due to the fact that draft copies of both initiatives were leaked in December 2011, "Some interviewees argue that it was the Commission itself that leaked the proposals to get an unofficial reaction to the proposals. This caused the Commission to revise the proposals substantially, and the revision process entailed a huge internal battle within the Commission."⁵⁵⁷ It has not been confirmed if it was the Commission that leaked the proposals but the delays and postponements do not indicate a strong confirmation that the Commission was entirely satisfied with the final drafts. Nevertheless, the Commission finally published its legislative proposals in the form of an Enforcement Directive, intended to improve the implementation of the Directive and the Monti II Regulation, on the relationship between fundamental social rights and economic freedoms that, without reversing the decisions of the Court in the

⁵⁵⁴ Commission Staff Working Document, 'Impact Assessment: Revision of the legislative framework on the posting of workers in the context of provision of services' SWD(2012) 63 final, Section 2.2.1.

⁵⁵⁵ Annex 1: Key actions, Communication from the Commission, 'Single Market Act – Twelve levers to boost growth and strengthen confidence – "Working together to create new growth"' COM(2011) 206 final.

⁵⁵⁶ Europolitics 'Posting of workers at heart of priorities' 3 January 2012: <http://www.europolitics.info/europolitics/posting-of-workers-at-heart-of-priorities-artb322242-46.html> [accessed 14 June 2013].

⁵⁵⁷ Arnholtz, 'Slowing down Social Europe? The role of coalitions and decision-making arenas', op. cit., 54.

Laval Quartet, “would confirm that the right, or freedom to strike, should not be a mere slogan or a legal metaphor.”⁵⁵⁸

Even though these two proposals have been published collectively as a legislative package they are to be considered independently as the process of adoption is separate; the Enforcement Directive may be adopted under the ordinary legislative procedure whereas the Monti II Regulation is subject to unanimity in the Council of Ministers and through the consent procedure by the Parliament, thus, procedurally the Enforcement Directive will be easier to pass than the Monti II Regulation.

(ii) The Enforcement Directive

It is self-evident that this thesis focuses on the law; it presents a legal problem and offers legislative solutions, thereby looking at the issues through a legal lens. However, the political and economic perspectives must equally be included in this part in order to show the full picture and the reality of the economic turmoil that was playing out in Europe at the same time as the publication of this legislative package in spring 2012. The rate of unemployment in Greece reached a record high in February 2012 at 21.7% (bearing in mind that from 1983 to 2010 Greece’s unemployment rate averaged 9.43%).⁵⁵⁹ By May 2012 there were eleven EU countries in recession (Spain, Belgium, Greece, Ireland, Italy, The Netherlands, Portugal and Slovenia in the eurozone and Denmark, Czech Republic and the UK outside of the eurozone).⁵⁶⁰ As the Greek Government struggled to form a coalition and outcries from the British public for a referendum to determine whether the UK should continue to be a part of the EU, the newly elected French President François Hollande challenged the German-led austerity approach in finding a way out of the crisis. Therefore, the backdrop for the publication of the Enforcement Directive was tense, uncertain and uneasy. The only certainty was that there must be a way out of this economic crisis that was not only causing

⁵⁵⁸ EUROPA Press Release ‘Mr. László ANDOR EU Commissioner responsible for Employment, Social Affairs and Inclusion’, op. cit.

⁵⁵⁹ Trading Economics ‘Greece Unemployment Rate’: <http://www.tradingeconomics.com/greece/unemployment-rate> [accessed 14 May 2012].

⁵⁶⁰ Román and Fidler, ‘Europe, in Slump, Rethinks Austerity’ 1 May 2012, *The Wall Street Journal*.

world speculation on the success of the European Project,⁵⁶¹ but also highlighted the personal tragedies that were resulting from the current state of the economy.⁵⁶²

At this time of economic crisis, the Commission was still debating the Directive and its associated issues concerning the place of social rights, confirming its continued importance and relevance. It therefore needs to be considered how the Directive was affected by the crisis at this time and how the legislative proposal relates to its economic back-drop. In the press release announcing the legislative package, the following objective was provided, “To make the EU single market work better for workers and for business, the Commission has proposed new rules to increase the protection of workers temporarily posted abroad.”⁵⁶³ It is not suggested that this will have the effect of simultaneously solving the economic crisis of the Union, but it does show that the Commission was attempting to tackle two of the most prevalent symptoms of the crisis: rising unemployment and declining businesses. This is reminiscent of this thesis’ objective in finding a solution that can equally support social rights *and* economic freedoms in balance; in order to reflect *all* of the Directive’s objectives. Social rights clearly need increased support from the legislative bodies of the Union, yet during the recession, the economic interests also need support – both are needed equally in order to achieve “a highly competitive social market economy, aiming at full employment and social progress” in accordance with Article 3(3) TEU. “The possibility to provide services internationally represents an opportunity for business expansion across Europe, particularly for SMEs. Posting provides business and job opportunities, and is a source of additional income in sending countries; it contributes to the improvement of competitiveness and efficiency in receiving countries.”⁵⁶⁴ Furthermore, the opportunity of posting workers is not, as is commonly perceived, isolated to Eastern Europe as the only posting States, “Contrary to some perceptions, posted workers are not always just moving from East to West. The main departure countries for posted workers are

⁵⁶¹ Booker, ‘The European project is splitting apart at the very core’ 18 February 2012, The Daily Telegraph.

⁵⁶² Smith, ‘Greek man shoots himself over debts’ 4 April 2012, The Guardian.

⁵⁶³ EUROPA Press Release ‘Commission to boost protection for posted workers’ 21 March 2012: http://europa.eu/rapid/press-release_IP-12-267_en.htm?locale=en [accessed 14 November 2012].

⁵⁶⁴ Commission Staff Working Document SWD(2012) 63 final, op. cit., Section 3.1.5.1.

Poland, France and Germany. And the main destination countries are Germany, France and Belgium.”⁵⁶⁵

In the interests of protecting these workers, “the Commission has put forward concrete, practical proposals as part of an enforcement Directive to increase monitoring and compliance and to improve the way existing rules on posted workers are applied in practice.”⁵⁶⁶ The need for concrete and practical guidance on the posting of workers is highly sought-after, during the co-decision procedure one of the reoccurring themes that came from the Council and the Parliament was that the proposal for a Directive needed clearer definitions, arguably, the Directive has always lacked clarity. The legislative package also intends to prove that the Union has evolved beyond a trade organisation by incorporating social policies into its core values. This sentiment is prevalent in the legislative proposal, “To send a strong message that workers’ rights and their freedom to strike are on an equal footing with the freedom to provide services”.⁵⁶⁷ The Commission has therefore expressly confirmed that the new legislative package ensures that economic freedoms do not have primacy over social rights; they are equal.

The objective of the Enforcement Directive is to clarify the application of the Directive in practice, thus, it does not propose an entirely new Directive; its intention is to clarify (through better information), enforce (both State enforcement through sanctions and inspections and private law enforcement through joint and several liability) and generally solidify what is already there through more concrete guidance on its practical application. Accordingly, the original Directive remains valid.⁵⁶⁸

The provisions of the proposed Enforcement Directive are presented in a table below, that follows on from the table provided in Chapter 1, in order to display the Directive’s full story to date. An analysis of the provisions is detailed thereafter, summarising each Chapter as opposed to every Article.

⁵⁶⁵ EUROPA Press Release ‘Commissioner László Andor’s speaking points on “Posting of Workers”’ 21 March 2012: http://europa.eu/rapid/press-release_MEMO-12-202_en.htm [accessed 15 June 2013].

⁵⁶⁶ EUROPA Press Release ‘Commission to boost protection for posted workers’, op. cit.

⁵⁶⁷ Ibid.

⁵⁶⁸ EUROPA Press Release ‘Commissioner László Andor’s speaking points on “Posting of Workers”’, op. cit.

The Proposal (1991)	Amended Proposal (1993)	The Directive (1996)	Proposed Enforcement Directive (2012)
Article 1: Scope	Article 1: Scope	Article 1: Scope	<i>Chapter I: General Provisions</i> Article 1: Subject Matter
Article 2: Scope	Article 2: Scope	Article 2: Definition	Article 2: Definitions
Article 3: Terms and Conditions of Employment	Article 3: Terms and Conditions of Employment	Article 3: Terms and Conditions of Employment	Article 3: Preventing Abuse and Circumvention
Article 4: Implementation by 31 December 1992	Article 4: Cooperation on Information	Article 4: Cooperation on Information	<i>Chapter II: Access to Information</i> Article 4: Role of Liaison Offices
Article 5: This Directive is Addressed to the Member States	Article 5: Measures	Article 5: Measures	Article 5: Improved Access to Information
	Article 6: Implementation Two Years after its Adoption	Article 6: Jurisdiction	<i>Chapter III: Administrative Cooperation</i> Article 6: Mutual Assistance – General Principles
	Article 7: Commission Review	Article 7: Implementation by 16 December 1999	Article 7: Role of the Member State of Establishment
	Article 8: This Directive is Addressed to the Member States	Article 8: Commission Review	Article 8: Accompanying Measures

		Article 9: This Directive is addressed to the Member States	<i>Chapter IV: Monitoring Compliance</i> Article 9: National Control Measures
			Article 10: Inspections
			<i>Chapter V: Enforcement</i> Article 11: Defence of Rights – Facilitation of Complaints – Back-payments
			Article 12: Subcontracting – Joint and Several Liability
			<i>Chapter VI: Cross-border Enforcement of Administrative Fines and Penalties</i> Article 13: General Principles – Mutual Assistance and Recognition
			Article 14: Request for Recovery, Information or Notification
			Article 15: Suspension of the

			Procedure
			Article 16: Costs
			<i>Chapter VII: Final Provisions</i> Article 17: Penalties
			Article 18: Internal Market Information System
			Article 19: Amendment to [IMI Regulation]
			Article 20: Transposition
			Article 21: Report
			Article 22: Entry into Force
			Article 23: Addressees

Chapter I: General Provisions

Article 1(1) Enforcement Directive sets out its objectives, “to guarantee respect for an appropriate level of minimum protection of the rights of posted workers for the cross-border provision of services, while facilitating the exercise of the freedom to provide services for service providers and promoting fair competition between service providers.” There are several points that need to be raised here: (i) the level of protection is confirmed as being set at the ‘minimum’. The ETUC also suggested restoring the minimum character of the Directive⁵⁶⁹ but made this conditional on the fact that the social partners can fight for more favourable conditions, whereas the Commission has not included this condition in the Enforcement Directive; (ii) the freedom to provide services remains as one of the

⁵⁶⁹ Proposal 4, ETUC ‘A Revision of the Posting of Workers Directive: Eight proposals for improvement’, op. cit., 28.

core objectives, which is inevitable as the legal basis has not changed; (iii) fair competition and the protection of workers' rights have also remained as the core objectives, however, there is a subtle change – it only mentions the protection of the rights of *posted* workers and promoting fair competition between *service providers*. Whereas, the Directive does not make such distinctions. This may appear to be a subtle change but the implications could be very dangerous and in fact a step back in terms of social protection as it is only the interests of the service provider and the posted workers that are protected, not the host State workers or the host State undertaking which could in turn lead to decreased protection against social dumping.

This is not a strong start for the Enforcement Directive. However, this might be counteracted by Article 1(2) Enforcement Directive which contains the 'Monti Clause', as inspired by Article 2 Monti I Regulation⁵⁷⁰ and also Article 1(7) Services Directive,⁵⁷¹ it provides the following:

“This Directive shall not affect in any way the exercise of fundamental rights as recognised in Member States and by Union law, including the right or freedom to strike or to take other action covered by the specific industrial relations systems in Member States, in accordance with national law and practices. Nor does it affect the right to negotiate, conclude and enforce collective agreements and to take collective action in accordance with national law and practices.”

This provision is very promising and is a strong move on the part of the Commission in validating the importance of social rights and respect for the national industrial relations systems; the Directive shall not affect collective action, bargaining and agreements, in accordance with national law and practices. Whereas, the previous interpretation of the Court was that collective action, bargaining and agreements shall not affect the Directive. However, in principle, this thesis does not support the inclusion of the Monti Clause into the Directive as it would overly compensate the right to take collective action and create an

⁵⁷⁰ Monti I Regulation (EC) No. 2679/98 on the functioning of the internal market in relation to the free movement of goods among the Member States, [1998] OJ L337/8, Article 2.

⁵⁷¹ Services Directive, op. cit., Article 1(7).

‘either/or’ solution, as opposed to developing a more realistic solution that intends to balance the competing interests of economic freedoms and fundamental rights.

Article 2 Enforcement Directive provides definitions intended to improve the clarity of the Directive, however, considering one of the major issues with the Directive is its lack of clarity it is somewhat disappointing that the only definitions provided are for the ‘competent authority’, ‘requesting authority’ and ‘requested authority’.

Article 3 Enforcement Directive is more helpful as the provision is entirely dedicated to preventing abuse and circumvention; something that was not mentioned in the original Directive, perhaps because the loopholes were only fully realised in practice. There are two sub-paragraphs included in this Article and, just as the thesis has proposed under Solution Number One, the first one intends to determine whether an undertaking is genuinely established in a Member State, this should combat the use of letter-box companies, “the criteria relating to what constitutes a genuine establishment of the service provider in a Member State will help avoid ‘creative use’ of Directive 96/71/EC for situations that are not proper postings in the sense of the Directive.”⁵⁷² For example, the criteria include the place where the undertaking has its registered office and administration, pays taxes and performs its substantial business activity and the place where posted workers are recruited. The second sub-paragraph intends to clarify the temporary nature of the posted worker, in order to avoid the predicament in which migrant workers circumvent all of the rules of the host State under the guise of being ‘posted’. Criteria to establish this include that the posting is carried out for a limited period and it takes place in a Member State other than the one in which the posted worker habitually carries out work and the posted worker must return to the home State following completion of their work in the host State. However, the Enforcement Directive was not bold enough to stipulate a fixed time limit that constitutes a “posting” in the interests of clarity and reducing potential abuses, which is somewhat disappointing, especially as other Union legislation has made use of such a provision, “social security rules (Regulation 883/2004) set a limit of two years, which if exceeded obliges the employee to be covered by the social

⁵⁷² Proposed Enforcement Directive COM(2012) 131 final, op. cit., Section 3.4.2.

security regime of the host country.”⁵⁷³ Accordingly, this thesis maintains, as set out under Solution Number One, that a time limit is required.

Chapter II: Access to Information

Article 5 Enforcement Directive encourages an improved access to information by offering very detailed instructions as to how this information should be made available which certainly indicates an improvement in the area. Article 5(4) specifies that where the conditions are laid down in collective agreements, the social partners shall identify these and provide the relevant information for service providers and posted workers. This will not only grant greater transparency of the applicable conditions for service providers and posted workers but will also assist in recognising the applicability of the relevant collective agreements.

However, despite the access to information improving, the information itself, embodied in the seven terms and conditions of employment under Article 3(1) Directive, has not been amended at all by the proposed Enforcement Directive and as concluded above, Article 3 Directive is the provision that requires the greatest clarification in light of the identified issues. Accordingly, improving the access to information without improving the information itself merely provides better lighting to the same problem. This is the first indicator that the Enforcement Directive’s effect will ultimately enforce the problems.

Chapter III: Administrative Cooperation

This Chapter establishes the importance of improved information as one of the main priorities of this proposed legislation. Article 6 Enforcement Directive encourages mutual assistance between Member States, such as replying to reasoned requests for information and carrying out checks, inspections and investigations. After all, it is the competent authorities of the Member States that are best placed to identify any abuse or misapplication of the Directive, therefore, cooperation between the Member States is essential. Article 7 Enforcement Directive details the role of the home State. It specifies that the service provider

⁵⁷³ Commission Staff Working Document SWD(2012) 63 final, op. cit., Section 3.2.2.1.

continues to control, monitor and take supervisory or enforcement measures in accordance with its national law, practice and administrative procedures in respect of the posted workers and it shall assist the host State to ensure compliance with both the Directive and the Enforcement Directive. As is well-established, this Directive has granted a great deal of support to the interests of the service provider and it is high-time that an equal amount of responsibility is apportioned.

Chapter IV: Monitoring Compliance

The Commission has stressed the importance of this Chapter, “an effectively functioning system of this kind may render certain obligations superfluous.”⁵⁷⁴ Ideally, this is how the Directive should work in practice; whereby the monitoring and cooperation is so effective that further requirements imposed on the service provider are rendered redundant.

The issue of national control measures has been a sticking point in the case law and often the Court has found the measures to be a restriction of the freedom to provide services, accordingly, Article 9 Enforcement Directive supports the application of the following control measures: (i) an obligation of the service provider to make a declaration including the identity of the service provider, the presence of one or more clearly identifiable posted workers, the number of posted workers, the duration of the posting, their location and the nature of the service being provided; (ii) an obligation to keep or make available and/or to retain copies in paper or electronic format of the employment contract, payslips, time-sheets and proof of payment of wages or copies of equivalent documents during the period of posting; (iii) a translation of the documents referred to above, provided the documents are not excessively long; and (iv) an obligation to designate a contact person in the host State to negotiate on behalf of the employer with the relevant social partners. It is submitted that these provisions show an enormous step forward and improvement of the Directive. As they are provided in the body of the text of this proposed Enforcement Directive, the Court would have more concrete guidance on which obligations may be imposed on service providers thereby guaranteeing greater clarity. However, the requirements provided in

⁵⁷⁴ Proposed Enforcement Directive COM(2012) 131 final, op. cit., Section 3.4.5.

Article 9 are the limit, as it states, “Member States may *only* impose the following administrative requirements and control measures [emphasis added]” and the declaration that is permitted under Article 9(1)(a) “may only cover” the elements stipulated. This is not necessarily a bad thing as the intention is to impose more obligations on the service provider, but not to the extent that it becomes disproportionate and so onerous that it would inevitably dissuade undertakings established in another Member State from posting their workers under the provision of services. The exercise of codifying the requirements that can be imposed on the service provider has the effect of making clear those that cannot, by process of elimination, such as an obligation to obtain an authorisation or have any form of establishment in the host State. However, this thesis still maintains that it would be more suitable to provide a non-exhaustive list, in the interests of greater flexibility in practice.

Article 10 Enforcement Directive provides that adequate inspections must be carried out based on risk assessment by the competent authorities in order to control and monitor compliance with the Directive. This may also be carried out by other bodies, “In order to reflect the different industrial relations systems and diversity of systems of control in the Member States, other actors and/or bodies may also monitor certain terms and conditions of employment of posted workers, such as the minimum rates of pay and working time.”⁵⁷⁵ In order to make this as effective as possible, again the principle of cooperation between the posting and hosting States is required. The tone of the Enforcement Directive is that the Commission is willing to bolster social rights and place more necessary obligations on the service provider so that the Directive is not just a Directive for service providers but is also there for the host State, for instance to fill skills and labour shortages, and also for the posted workers themselves. However, the Directive, and its proposed Enforcement counter-part can only do so much; on the ground, the competent authorities must also be willing to accept responsibility for complying and monitoring that compliance with the provisions of the Directive.

Chapter V: Enforcement

⁵⁷⁵ Ibid.

Article 12 Enforcement Directive is the joint and several liability provision that ensures posted workers may enforce the obligations as per the Directive, “abuses, exploitation and unfair competition seem to be concentrated in the construction sector which also represents the highest number of the postings (about 25%).”⁵⁷⁶ Thus, this section is limited to direct subcontractor situations in the construction sector, however, Member States may, if they so wish, extend these provisions to other sectors. It is intended to be used in combination with State enforcement so that the service recipient in the host State can be held liable for non-compliance. Article 12 provides that the contractor can, in addition to or in place of the subcontractor (this would be the service provider), be held liable by the posted worker and/or common funds or institutions of social partners for non-payment of any outstanding remuneration and any back-payments or refund of taxes or social security contributions that have been unduly withheld from the posted worker’s salary. This section adds that the liability is limited to the worker’s rights acquired under the contractual relationship between the contractor and the subcontractor. However, a contractor that has undertaken due diligence will not be liable in accordance with the above. Paragraph 25 of the Preamble to the Enforcement Directive adds that, “In specific cases, other contractors may, in accordance with national law and practice, be also held liable for failure to comply with the obligations under this Directive,” as the Commission has stated some networks and chains of subcontracting can be complicated, therefore, it is important to add a certain degree of flexibility to the joint and several liability provision so that it may be implemented on a case-by-case basis.

This is likely to be one of the more contentious elements of the Enforcement Directive as joint and several liability does not exist in every Member State⁵⁷⁷ and therefore there may be additional administrative costs in implementing these measures, which could have the effect of restricting the freedom to provide services, but the Commission stated that would be “justified

⁵⁷⁶ EUROPA Press Release ‘Q&A – Legislative initiatives on the posting of workers’, op. cit.

⁵⁷⁷ Only eight Member States (Italy, the Netherlands, Belgium, Finland, France, Spain, Austria and Germany) and Norway have established joint and/or several liability in their own national legislation. See: Eurofound, ‘Liability in subcontracting processes in the European construction sector’ by Houwerzijl and Peters: <http://www.eurofound.europa.eu/publications/htmlfiles/ef0894.htm> [accessed 14 November 2012].

by the protection of workers rights”⁵⁷⁸ highlighting the elevated status of social rights in the Union.

Chapter VI: Cross-border Enforcement of Administrative Fines and Penalties

This Chapter intends to guarantee that the enforcement provisions, as detailed above, are completely followed through, so that the identified penalties and fines may be recovered in full, “Given the transnational nature of posting, the mutual recognition and enforcement of fines and penalties, [particularly in the home State], is crucial... Part of the problem is caused by the fact that non-compliance with the obligations under Directive 96/71/EC is sanctioned differently in the Member States.”⁵⁷⁹ This Chapter does not harmonise the rules in this area, but respects and accepts the national laws, regulations and administrative practices. For example, Article 13 Enforcement Directive provides that the request for recovery shall be made in accordance with the rules in force in the requesting Member State and the recovery or notification will be made in accordance with the rules in force of the requested Member State.

Article 14 Enforcement Directive details the information required for the request for recovery, information or notification, “shall at least indicate” the name and address of the addressee, the purpose of the request and the relevant dates of the enforcement process, the amount of the fine or penalty and other relevant information. As is expected, in line with the principle of cooperation, the requested authority must provide any information and mutual assistance to the requesting authority to assist with the recovery of the fine or penalty.

Article 15 Enforcement Directive stipulates that where the request is contested by the service provider, or an interested party, the enforcement procedure shall be suspended whilst awaiting the decision of the appropriate national authority and finally, Article 16 Enforcement Directive stipulates the provisions on costs.

These cross-border enforcement provisions are not specified in the Directive and have not been considered under Solution Number One. However, it is submitted that if Solution Number One is adopted, these provisions suggested

⁵⁷⁸ EUROPA Press Release ‘Q&A – Legislative initiatives on the posting of workers’, op. cit.

⁵⁷⁹ Proposed Enforcement Directive COM(2012) 131 final, op. cit., Section 3.4.7.

by the Enforcement Directive, should be included. This is because Solution Number One has also advocated the importance of including joint and several liability for worker protection and, as a follow-on, this necessitates that workers must also be guaranteed the recovery that is due, which needs to be specified in the Directive.

Chapter VII: Final Provisions

Article 18 Enforcement Directive, which is intended to support the administrative cooperation provisions, endorses the IMI System, which has also been suggested under Solution Number One. The IMI is an electronic information exchange system that allows authorities to communicate more easily with the relevant authorities in other Member States and is intended to assist with the principle of cooperation, as provided for throughout the Enforcement Directive. A further benefit of implementing IMI is financial, “The use of an IT tool such as IMI could have a significant cost-reducing impact, facilitating direct contacts between competent administrations and reducing the need for translation of correspondence and documents.”⁵⁸⁰ It is specified that the competent authorities shall use IMI as much as possible, however, Member States may continue to apply bilateral agreements between the competent authorities in respect of the application and monitoring of the terms and conditions of employment under Article 3 Directive.

(iii) Responses to the Enforcement Directive

The Enforcement Directive shows some promise and it makes some progressive and welcome suggestions. For example, greater cooperation on information via use of the IMI System, increased monitoring and national control measures and the inclusion of joint and several liability which are all intended to improve the effectiveness and clarity of the Directive in an effort to combat circumvention and abuse of the applicable rules and to boost worker protection. Also, during the development of the proposed legislation the social partners were given the

⁵⁸⁰ Commission Staff Working Document SWD(2012) 63 final, op. cit., Section 6.3.1.

opportunity to provide their feedback on the legislative initiative at both the public consultation launched on the Single Market Act and also at the stakeholder Conference in June 2011 on the posting of workers. The explicit respect for social partners is a welcome addition by the Enforcement Directive, particularly, as it extends to the Member States' industrial relations systems, "Respect for the diversity of national industrial relations systems as well as the autonomy of social partners is explicitly recognised by the Treaty."⁵⁸¹ The Enforcement Directive cited Article 152 TFEU in this respect, thereby confirming the importance of this provision at Treaty level. Paragraph 8 of the Preamble adds, "Trade unions play an important role in the context of the posting of workers for the provision of services since social partners may, in accordance with national law and/or practice, determine the different levels (alternatively or simultaneously) of the applicable minimum rates of pay." This is a vital addition as the Directive, as interpreted by the Court, lacks respect for the differing labour systems and thereby has previously allowed no room for manoeuvre in situations where, for example, certain Member States do not have a minimum rate of pay.

However, in spite of these positive elements, the Enforcement Directive, as it currently stands, should not be adopted as it has failed to address three major issues. These three issues are so prominent that unless they are specifically addressed and rectified, the Enforcement Directive has done no more than tweak various elements and left the substantive issues untouched. Therefore, in light of the bigger picture, adopting the Enforcement Directive as it is, would prove futile. The first major issue is that the Enforcement Directive has left the legal basis untouched and, in fact, enforces Article 56 TFEU as the legislative foundation by only promoting the rights of posted workers and the interests of service providers in accordance with its objectives under Article 1(1) Enforcement Directive. The legal basis has been identified by this thesis as one of the most important elements to amend; unless the legal basis changes, nothing changes.

Secondly, the Enforcement Directive does not touch on Article 3 Directive at all. This provision is the main bone of contention in the Directive and it has not been enforced or amended in any way. Accordingly, in respect of Article 3(1) Directive, the Enforcement Directive has committed itself to the minimum level

⁵⁸¹ Proposed Enforcement Directive COM(2012) 131 final, op. cit., Preamble [7].

of protection. Paragraph 22 of the Preamble to the Enforcement Directive provides the following, “Member States are particularly encouraged to introduce a more integrated approach to labour inspections. The need to develop common standards in order to establish comparable methods, practices and minimum standards at Union level should equally be examined.” This is problematic because it is well-established that the Directive does not intend to require Member States to set minimum wages,⁵⁸² neither does it intend to harmonise certain standards, yet this provision stipulates that Member States are particularly encouraged to develop common standards for the purpose of establishing minimum standards at Union level, which can easily be interpreted as an invitation to endorse social dumping. It is highly unlikely that that was the intention of the Commission, nevertheless, there is scope for misinterpretation here and accordingly it is advised that any future amended Directive or Enforcement Directive should steer clear of so avidly pursuing the minimum standard.

As aforementioned, guaranteeing the minimum rate of pay may be the most pragmatic response, however, the emphasis on pursuing the minimum could inevitably, as has been done before by the Court, turn this provision into a maximum. Therefore, this thesis suggests that applying the two words “at least” in front of “the minimum” would make a much-needed difference, thus, granting the Court an alternative interpretation to aim higher and provide a greater scope for equality. After all, Article 153(5) TFEU specifies pay as being excluded from the Union’s competence and Article 157(1) TFEU expands on this by stating, “Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.” Despite there being no Union competence in respect of pay, the Court conferred horizontal direct effect on Article 157(1) TFEU in *Defrenne*⁵⁸³ which acknowledged that the work of an air stewardess is identical to that of a cabin steward and accordingly equal pay for equal work must apply in light of the EU general principle of equality. Therefore, the general principle of equal pay for equal work or work of equal value forms a fundamental principle of the Union and is reminiscent in the Directive which provides for equality of treatment between men and women and other forms of

⁵⁸² Ibid., Section 1.

⁵⁸³ *Defrenne*, op. cit.

non-discrimination.⁵⁸⁴ In the Q&A press release from the Commission it was asked, “Why not revise the 1996 Directive... in order to provide for equal treatment between posted workers and nationals?”⁵⁸⁵ The Commission’s answer to this pertinent question reads as follows, “There is nothing wrong with the current posting rules... Introducing an obligation for ‘equal pay for equal work or work of equal value’ with respect to posted workers would ignore the fundamental difference between a posted worker and a migrant worker: the posted worker is not integrated into the labour market of the host country, whereas the migrant worker is.” Firstly, declaring that there is nothing wrong with the current rules is clearly wrong; if there was nothing wrong with the current rules, there would be no need for better enforcement. The latter part of the answer appears to be the Commission’s mantra in defending its position that posted workers, whilst working in the host State, do not enter the host State’s labour market. This reveals that the Commission does not view the equality principle as being compatible with posted workers and therefore maintains the distinction between the free movement of workers and the freedom to provide services and thereby excluding the possibility of invoking Article 45 TFEU for the protection of posted workers.

Therefore, in spite of the equality principle being a fundamental principle of Union law that has been granted horizontal direct effect in prior case law, it cannot be extended to the equality of treatment between posted and national workers; the Directive is allowed to distinguish/discriminate between those workers. To use an example to better illustrate this point, the national minimum wage in the UK is £6.31,⁵⁸⁶ and in the UK a bricklayer can earn up to £15.06 per hour.⁵⁸⁷ The Directive, and now its Enforcement counter-part as well, provide that posted workers shall be guaranteed the minimum rate of pay of the host State. Therefore, on the same construction site in the UK, posted workers can be paid £6.31 per hour whilst the host State workers can earn up to £15.06 per hour. From a commercial perspective, this is one of the appeals of employing posted workers and therefore should be granted for the benefit of the internal market, however, it

⁵⁸⁴ Directive, *op. cit.*, Article 3(1)(g).

⁵⁸⁵ EUROPA Press Release ‘Q&A – Legislative initiatives on the posting of workers’, *op. cit.*

⁵⁸⁶ Directgov ‘National Minimum Wage rates’: <https://www.gov.uk/national-minimum-wage-rates> [accessed 15 June 2013]. This wage rate is the main rate per hour for workers aged 21 and over as of 1 October 2013.

⁵⁸⁷ PayScale ‘Bricklayer Hourly Rate’ updated 11 June 2013: http://www.payscale.com/research/UK/Job=Bricklayer/Hourly_Rate [accessed 15 June 2013].

is emphatically urged that these minimum standards are not embedded into the legislation; there must be room for improvement. Therefore, advocating the minimum is *only* appropriate when there is room to apply more favourable terms and conditions of employment. Unfortunately, however, the Enforcement Directive does not propose amending or enforcing the favourability provision under Article 3(7) Directive, thereby reinforcing that the minimum should be read as the minimum (or, in fact, the maximum).

Consequently, as Article 3 Directive has not been considered for amendment, this inevitably means that the limiting rules in respect of applying collective agreements will remain the same. It can be argued that paragraph 7 of the Preamble to the Enforcement Directive supports respect for the diversity of national industrial relations systems, as well as the autonomy of social partners, however, in *Laval* the Court could have argued that it showed respect for the differing labour systems and the social partners but did not have the legitimate expression at its disposal to apply the Swedish collective agreement to the posted workers. Therefore, it is clear that to instigate real change the Court needs specific instruction so that it cannot so easily disregard certain terms and conditions of employment, for example, the prominent issue concerning whether collective agreements need to be declared in the implementing legislation has been left open by the Enforcement Directive and therefore the problem remains. It is the detail of Article 3 Directive that needs amending in order to ensure greater regulation of posted workers and subsequently more suitable future rulings by the Court.

The final provision of Article 3 Directive that has been left untouched by the Enforcement Directive is Article 3(10) Directive, so that the very restrictive interpretation of this provision, as seen in *Commission v Luxembourg*,⁵⁸⁸ could be a precedent for any future rulings on public policy.

Thirdly, the final substantive element that is missing from the Enforcement Directive is the express protection for all workers and fair competition between all undertakings; Article 1(1) Enforcement Directive states its objectives, “to guarantee respect for an appropriate level of *minimum* protection of the rights of *posted* workers for the cross-border provision of services, while facilitating the exercise of the freedom to provide services for

⁵⁸⁸ C-319/06 *Commission v Luxembourg*, op. cit.

service providers and promoting fair competition between *service providers* [emphasis added].” This enforces the minimum level of protection in its objectives and also, only mentions the protection of the rights of posted workers and the interests of the service providers. Whereas, the original Directive sets its objectives as “any such promotion of the transnational provision of services [supposedly for the benefit of both service providers and recipients] requires a climate of fair competition [not necessarily just with the service provider in mind] and measures guaranteeing respect for the rights of [supposedly all] workers”.⁵⁸⁹ This suggests that only posted workers and service providers are protected by the Enforcement Directive. Accordingly, it could be interpreted that the Monti Clause will only apply to the protection of posted workers to negotiate, conclude and enforce collective agreements and to take collective action. This interpretation proves that the Enforcement Directive does not directly address the issues revealed in practice as the collective action in *Laval* was undertaken by the host State workers; not the posted workers.

The response from the European social partners has not been positive, “The ETUC deplores the minimalistic approach taken by the Commission by proposing an Enforcement Directive instead of a revision of the Posting of Workers Directive itself.”⁵⁹⁰ In respect of the provision on joint and several liability, the ETUC proposed removing the concept of ‘due diligence’ as the objectives of joint and several liability are “undermined by the stipulation that a contractor that has taken due diligence cannot be held liable.”⁵⁹¹ This is because, “There is no definition [of due diligence] at the European level and it would therefore vary from one Member State to the other. It has been indicated that in order to escape liability, it might be sufficient for the contractor to check the identity of the subcontractor and their history.”⁵⁹² This thesis agrees with the ETUC’s suggestion; in practice the inclusion of the due diligence provision could provide a loophole for the application of joint and several liability and, as

⁵⁸⁹ Directive, op. cit., Preamble [5].

⁵⁹⁰ ETUC ‘ETUC Declaration on the Commission proposals for a Monti II Regulation and Enforcement Directive of the Posting of Workers Directive’ 19 April 2012: <http://www.etuc.org/a/9917> [accessed 28 June 2013].

⁵⁹¹ Ibid.

⁵⁹² ETUC ‘ETUC position on the Enforcement Directive of the Posting of Workers Directive’ 5-6 June 2012: <http://www.etuc.org/a/10037> [accessed 28 June 2013].

discussed above, liability has been used before in posted worker cases⁵⁹³ therefore, the irony is that the legislative introduction of the provision with the condition of due diligence might actually have the effect of rendering its use ineffectual, as contractors will have legislative support so as to be excluded from liability.

BusinessEurope has not welcomed the legislative package, in fact it stated, “Employers are highly concerned about the Commission proposals adopted on 21 March 2012”.⁵⁹⁴ The main concern from BusinessEurope was the provision on joint and several liability, which it stated would only hamper development of the single market at a time when all EU policies should support economic growth and providing better information and improving administrative cooperation are the main factors that should better enforce the Directive. This thesis agrees with BusinessEurope that the Commission’s proposal is concerning, however, quite clearly, this is for different reasons.

Finally, an advocate for the Enforcement Directive has been the European Economic and Social Committee (EESC). The EESC has welcomed the Commission’s proposal by opining, “The message is clear: protect posted workers without neglecting the needs of businesses.”⁵⁹⁵ This is undeniable; the Enforcement Directive has catered for the interests of posted workers and, primarily, service providers. However, the same cannot be said for protecting the host State workers and upholding fair competition in the host State. “In the EESC’s view... it is important to have *equal minimum conditions of employment*... the directive should aim at *preventing unnecessary administrative costs* that place burdens on companies.” The two elements stressed by the EESC are worrying as it implies supporting minimum conditions applying equally to all workers and therefore driving down labour conditions in the host State and emphasises the priority not to restrict the freedom to provide services above other interests, which is surprising bearing in mind this Committee should be the voice of both economic *and* social policies.

⁵⁹³ Wolff & Müller, op. cit.

⁵⁹⁴ BUSINESSEUROPE ‘Posting of Workers’ Policy Briefing 3 April 2012: <http://www.buinesseurope.eu/Content/Default.asp?PageID=568&DocID=30086> [accessed 28 June 2013].

⁵⁹⁵ EUROPA Press Release ‘EESC: protect posted workers without penalising companies’ 24 September 2012: http://europa.eu/rapid/press-release_CES-12-56_en.htm?locale=en#PR_metaPressRelease_bottom [accessed 21 August 2013].

This thesis therefore cannot agree with the EESC's view and does not support the proposed Enforcement Directive. It can be appreciated that it has clearly been deeply considered and it provides some useful solutions, however – it is incomplete – and therefore to adopt it as it stands would be a mistake as it does not rectify all of the existing problems. In fact, what this Enforcement Directive has achieved is the enforcement of an unsatisfactory Directive. If this proposed legislation is adopted in its current form, it will enforce the most pertinent problems of the Directive, namely, the one-sided legal basis, the deeply problematic Article 3 Directive and the apparent lack of protection for all workers and all undertakings concerned. This legislative proposal has attempted to give the impression of granting greater support and solving the problems that needed amending, however, through its subtle changes and extensive provisions it is masking the fact that it has not even attempted to address the fundamental problems witnessed in the *Laval* Triplet and it has in fact created legislative loopholes for the service providers, such as the due diligence provision on joint and several liability and the fact that when it drew attention to the most relevant rights and principles of the Charter that are due notable protection in the Enforcement Directive, under paragraph 33 of the Preamble, it chose to omit Article 12 Charter on the freedom of assembly and of association. It has ingrained the minimum level of protection and therefore promises to drive down labour conditions even further and firmly places them at the very bottom, guaranteeing social dumping and rising social tensions.

It is implored: the Enforcement Directive is no solution for the Directive; it is an elaborate decoy that seemingly allows the Commission to be seen to be doing something but as it has not even attempted to address the fundamental issues it is no more than a wasted opportunity.

(iv) The Monti II Regulation

According to the Monti Report, the *Laval* Quartet “revived an old split that had never been healed: the divide between advocates of greater market integration and those who feel that the call for economic freedoms and for breaking up regulatory

barriers is code for dismantling social rights protected at national level.”⁵⁹⁶ Therefore, the Commission, along with the European social partners, felt that now is the time to work towards finally healing this divide and to provide legislative guidance on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services. A Regulation was considered to be the most suitable legal instrument for this task as “The direct applicability of a Regulation will reduce regulatory complexity and offer greater legal certainty for those subject to the legislation across the Union by clarifying the applicable rules in a more uniform way.”⁵⁹⁷ In the Monti II Regulation the Commission clearly intended to provide very strict and concrete guidance on this issue, especially as the right to strike is outside the scope of the Union’s competence therefore this proposed Regulation has the potential to be the seminal legislative instrument in this area.

In spite of its great potential, the Regulation itself is actually very short, only consisting of five Articles. The first paragraph of the Preamble to the Regulation emphasises the importance of the right to take collective action; citing the European Social Charter, ILO Convention No. 87 and No. 98, the Community Charter of the Fundamental Social Rights of Workers and the Charter of Fundamental Rights (particularly Article 28) as well as enjoying constitutional protection in several Member States. The Preamble also cites Article 152 TFEU, stressing the importance of the role of social partners and the diversity of national systems. The right to take collective action does not stand alone and is a corollary to the right to collective bargaining and to negotiate and enter into collective agreements, as protected by Article 11 ECHR. However, the right to take collective action, as is the case with the fundamental economic freedoms, is not an absolute right, but is subject to certain limitations which may have to be reconciled, as specified by paragraph 11 of the Preamble, in accordance with the principle of proportionality by national authorities – importantly, this grants the national authorities control of assessing proportionality, thereby respecting that the right to strike is not a competence of the Union. Paragraph 8 of the Preamble is, in my opinion, an incredibly important provision and it is suggested that this

⁵⁹⁶ Report to the Commission, ‘A New Strategy for the Single Market: At the Service of Europe’s Economy and Society’, op. cit., Section 3.2.

⁵⁹⁷ Proposed Monti II Regulation COM(2012) 130 final, op. cit., Section 3.2.

should also be included in the Directive (as aforementioned under Solution Number One) as it directly addresses one of the main issues as seen by the case law on posted workers, “The protection of workers, in particular their social protection and the protection of their rights against social dumping, as well as the desire to avoid disturbances on the labour market have been recognised as constituting overriding reasons of general interest justifying restriction of the exercise of one of the fundamental freedoms of Union law.” This would not only support the interests of the host State workers but also the host State, particularly against social dumping and disturbances to the labour market. The Commission refuses to accept that the use of posted workers causes a disturbance on the labour market of the host State as they are only ‘temporary’ but as argued previously, their temporary nature does not negate the fact that they are present. Therefore, this provision would suitably assist in rectifying the balance in the case of posted workers. Paragraph 9 adds to this by stating that trade unions should be able to take collective action “provided this is done in compliance with Union and national law and practice.” The exercise of collective action has been made conditional on the fact that it complies with Union and national law and practice which satisfactorily sets the correct balance of the competing interests at stake.

Article 1 contains the ‘Monti Clause’ and, interestingly, there is a difference between this Clause and that of the Enforcement Directive; in Article 1(2) Enforcement Directive it provides, “This Directive shall not affect in any way the exercise of fundamental rights as recognised in Member States and by Union law”, however, in the Monti II Regulation it has deleted the words “and by Union law”, suggesting that the Clause has a greater deference to the Member States’ interests in the Monti II Regulation.

Article 2 specifies that the freedom of establishment and the freedom to provide services will respect the fundamental right to take collective action and equally, this fundamental right will respect those fundamental freedoms. This provision intends to place these competing interests on an equal footing, however, notably, it does not go so far as to state that there is no primacy between the two, even though that is the implication, presumably because by saying nothing at all this silently leaves the option open to grant primacy to economic freedoms and the Commission would not want to grant primacy to fundamental rights. This intended balance aims for equality and by expressly stating the equal value of

social rights and economic freedoms clearly there is progression, however, the difficulty is that in practice, the Court will still have to choose one over the other when there is a conflict of interest. Therefore, implicating that no primacy exists between economic freedoms and fundamental social rights is in fact “implausible, and is either naïve or disingenuous. It is in the nature of disputes between economic freedoms and social rights that both cannot prevail simultaneously.”⁵⁹⁸ Clearly, the aim of equality between the two is necessitated, however, in reality it may be nothing more than rhetoric. This is particularly true in the case of the Enforcement Directive as the legal basis has remained the same, thus, the Court is restricted in its scope and is likely to continue to uphold the freedom to provide services above all else.

(v) *Responses to the Monti II Regulation*

“In my view, there is nothing of merit in the Draft Monti II Regulation”.⁵⁹⁹ Ewing’s response to the draft Monti II Regulation is pithy and resolute. Ewing opined that the legislative proposal is a wasted opportunity as it has failed to acknowledge the developments that have been made since *Viking* and *Laval* and instead “fossilizes”⁶⁰⁰ these two cases in which, “the ECJ developed a standard for the protection of the right to strike that is lower than that existing in many EU Member States.”⁶⁰¹ Member States have a duty to comply with certain international conventions such as ILO Convention No. 87 on the freedom of association and protection of the right to organise, No. 98 on the right to organise and collective bargaining and Article 11 ECHR on the freedom of assembly and association; these international agreements are also part of the fabric of Union law. The developments as seen in the ECtHR, including *Demir and Baykara*⁶⁰² and *Enerji Yapi-Yol Sen*,⁶⁰³ which have contributed to the development of the

⁵⁹⁸ Ewing, ‘The Draft Monti II Regulation: An Inadequate Response to *Viking* and *Laval*’ (2012) IER Briefing, 14.

⁵⁹⁹ *Ibid.*, 2. It is to be noted that this article was published on 16 March 2012 and is therefore based on the draft Monti II Regulation, not the finalised proposal.

⁶⁰⁰ *Ibid.*, 13.

⁶⁰¹ Fabbri, and Granat, “‘Yellow Card, But No Foul’: The Role of the National Parliaments under the Subsidiarity Protocol and the Commission Proposal for an EU Regulation on the Right to Strike’ (2013) CML Rev, 50: 115-144, 115.

⁶⁰² *Demir and Baykara v Turkey* (Application No. 34503/97) [2008] ECHR 1345.

⁶⁰³ *Enerji Yapi-Yol Sen v Turkey* (Application No. 68959/01) [2009] ECHR 2251.

rights of collective bargaining and action respectively and the first of which was decided within a year of *Viking* and *Laval*, indicate that, “The first weakness of Monti II is that it writes into a legislative form and preserves in aspic a judicial formulation that was out of date within a year of its expression.”⁶⁰⁴

It is understood that the Monti II Regulation was expected to show a concerted move away from the judgments of *Viking* and *Laval* in order to make a real promise for change and to take into account the developments that have been made since the judgments. However, it is submitted that just because Monti II did not legislate the rulings of *Demir and Baykara* and *Enerji Yapi-Yol Sen*, does not mean that the Court cannot take them into account. Furthermore, it is submitted that the developments in the ECtHR since *Viking* and *Laval* have not been ignored by the drafters of the Monti II Regulation as paragraph 2 of the Preamble explicitly refers to Article 11 ECHR and then cites the case *Demir and Baykara* and further, the first paragraph of the Preamble cites ILO Convention No. 87 and No. 98.

The concern that the jurisprudence of *Viking* and *Laval* has been written into the Monti II Regulation may be attributed to Article 2 Monti II Regulation which specifies that both the freedom of establishment and the freedom to provide services shall respect the fundamental right to take collective action and vice versa – which is arguably the central clause of the Regulation. The issue is that this provision embodies the principle of proportionality, “Yet, because the application of the principle of proportionality by the ECJ was at the core of the *Viking* and *Laval* rulings (and at the core of the criticism to these decisions) it is difficult to see how this provision of the proposed regulation was likely to trigger a change in the case law of the ECJ and enhance the protection of the right to strike.”⁶⁰⁵ In *Viking* and *Laval* the Court recognised that the right to strike is a fundamental right of the Union constitutional order, nevertheless, the economic freedoms prevailed. Accordingly, the fear generated by these cases, now re-ignited by this legislative proposal, is that the fundamental right to strike, which is a constitutional right in some Member States, is merely declaratory at Union level.

⁶⁰⁴ Ewing, ‘The Draft Monti II Regulation: An Inadequate Response to *Viking* and *Laval*’, op. cit., 12.

⁶⁰⁵ Fabbrini and Granat, “‘Yellow Card, But No Foul’: The Role of the National Parliaments under the Subsidiarity Protocol and the Commission Proposal for an EU Regulation on the Right to Strike’, op. cit., 134.

Barnard discussed the application of the proportionality test in the Monti II Regulation at the FORMULA Conference.⁶⁰⁶ In Barnard's presentation entitled "Free movement and labour rights – Is it possible to square the circle?" in light of the case law and its consequent 'chilling effect' on industrial action, three options were considered as alternative solutions to the Monti II Regulation: (i) Be more robust about the scope of application of EU law, for example, excluding the application of the internal market freedoms from collective action – currently, the lines are blurred, therefore this option would introduce a threshold element. There are uncertainties in this area, not only seen in the judgments but also in the primary law itself,⁶⁰⁷ nevertheless, it is suggested that, on balance, by instigating these stricter parameters, the Court will have less flexibility in making its decisions, which would certainly be a detriment; (ii) Reverse the priority of the rights which would grant primacy to social rights. This is what the ETUC has called for, however, Barnard stated that this would solve one problem, yet create another, which this thesis is in full agreement with; and (iii) Engage in proper balancing, of which the Monti II Regulation attempted to secure via the three-pronged proportionality test:

“A fair balance between fundamental rights and fundamental freedoms will in the case of conflict only be ensured when a restriction imposed by a fundamental right on a fundamental freedom is not permitted to go beyond what is appropriate, necessary and reasonable to realise that fundamental right. Conversely, a restriction imposed on a fundamental right by a fundamental freedom cannot go beyond what is appropriate, necessary and reasonable to realise the fundamental freedom.”⁶⁰⁸

⁶⁰⁶ The FORMULA project has published one book to date: Evju (Editor), *Cross-Border Services, Posting of Workers, and Multilevel Governance*, op. cit., and there is a second book due to be published in 2014. The University of Oslo hosted the 'FORMULA Conference' three times in 2009, 2010 and 2012 with Professor Evju as the head of the project. Presenters included Professor Houwerzijl, who has undertaken numerous studies on the subject on behalf of the European Commission, Professors Novitz and Barnard, both experts on the subject, Mr Feenstra, Deputy Head of Unit DG EMPL and Mr Jonsson, Legal Adviser to the Swedish Trade Union Confederation, amongst other very high profile names, integral to the development of this legislation. Coincidentally, the final Conference took place on the 22 and 23 March 2012; one day after the publication of the proposed Enforcement Directive and Monti II Regulation.

⁶⁰⁷ See Chapter 2 under the "Competence" sub-heading for a detailed review.

⁶⁰⁸ Proposed Monti II Regulation COM(2012) 130 final, op. cit., Preamble [13].

The first option presented by Barnard of introducing a defined threshold regarding the application of EU law in an area that is technically outside the Union's competence, yet which the Court has brought within its scope, oversteps the jurisdiction of a sensitive area that is intended to be left to the Member States' prerogative and secondly, by re-prioritising the interests, the problem will only change direction. Therefore, the third option of expressly bolstering social rights by placing them on an equal footing with the economic freedoms is a valid response that has been accepted in other fundamental rights' instruments such as the Charter; Article 52(1) Charter stipulates that any limitation on the exercise of the rights and freedoms recognised by the Charter will be subject to the principle of proportionality and as social rights are not absolute, they can be limited if the limitation is necessary and genuinely meets the objectives of the general interest. This also inspired AG Trstenjak's Opinion in *Commission v Germany* which provided the three-pronged approach to proportionality – appropriateness, necessity and reasonableness – by essentially mimicking word-for-word paragraph 13 of the Preamble to the Monti II Regulation.⁶⁰⁹ AG Trstenjak's statement on proportionality followed her argument that there is not a hierarchical relationship between fundamental freedoms and fundamental rights, AG Trstenjak "calls for a 'fair balance' between rights and freedoms, emphasizing repeatedly... that the proportionality enquiry cuts both ways."⁶¹⁰ This shows true balance – a premise that this thesis whole-heartedly pursues – and it is submitted that the proportionality principle does not erode the significance of fundamental rights; it bolsters their significance by equally applying to fundamental freedoms. The starting point is the same: neither element is an absolute, they are both subject to equal treatment and both must be open to yield to the other.

Therefore, presumably, it is not the proportionality test itself that is at issue, but its application in the collective relations context,⁶¹¹ which has never been accepted as a natural fit, "While the concept may be sufficiently broad and flexible to satisfy both employers and trade unions in some situations, it also leaves a lot of room for interpretation by national courts and influence by national

⁶⁰⁹ AG Opinion C-271/08 *Commission v Germany*, op. cit., [190].

⁶¹⁰ Syrpis, 'Reconciling economic freedoms and social rights – the potential of *Commission v Germany* (case C-271/08, judgment of 15 July 2010)', op. cit., 225.

⁶¹¹ Hös, 'The Principle of Proportionality in the *Viking* and *Laval* cases: An Appropriate Standard of Judicial Review?' (2009) EUI Working Paper Law 2009/06.

political sentiments.”⁶¹² Accordingly, it has been stated that the very essence of collective relations is incompatible with the principle of proportionality:

“Courts in the Member States, very sensibly, have been extremely cautious in invoking any test of proportionality as regards the right to strike... It is in the very nature of negotiations that both parties set demands at their highest and through negotiation over time seek a compromise... At what stage of this process and against what criteria is the test of proportionality to be applied? Any test based on proportionality in assessing the legitimacy of collective action is generally avoided in the industrial relations models of Member States for the very reason that it is essential to maintain the impartiality of the state in economic conflicts.”⁶¹³

In her presentation, Barnard said that the difficulty with the proportionality test in respect of collective action is that the more successful a strike will be, the less likely it will be held as being proportionate. This indicates that leaving this area to balancing the interests via proportionality, gives the impression of great social progress, yet, in reality, it pertains to balancing the unbalanceable and the very notion that these rights can be made subject to balancing undermines the essence of their fundamental status, therefore, in spite of the progression, it will always result in the same decision by the Court. However, it is submitted that that feared conclusion is not guaranteed, due to the fact that social progress is currently one of the most dynamic areas of Union law and it is submitted that this, contrary to other opinions, has been appreciated by the Monti II Regulation; paragraph 8 of the Preamble provides that the protection of workers, particularly against social dumping and the desire to avoid disturbances on the labour market are recognised as overriding reasons of general interest that can restrict the economic freedoms. The fact that this has been subject to proportionality does not determine that these rights and their fundamental status have been negated; the fundamental freedoms are also subject to the proportionality test. The principle of proportionality is a general principle of EU law, integral to the functioning of the internal market and

⁶¹² Zahn, ‘The Viking and Laval Cases in the Context of European Enlargement’ (2008) Web Journal of Current Legal Issues 3, 11.

⁶¹³ Bercusson, ‘The Trade Union Movement and the European Union: Judgment Day’, *op. cit.*, 304.

is provided for within the ‘Common Provisions’ of the very first Title of the TEU under Article 5(4). It is not the principle of proportionality itself that is the issue but the fact that collective action has been caught by this principle. However, this concept is not new; it is submitted that from the moment *Viking* and *Laval* ruled that the right to strike is capable of restricting the freedom of establishment and the freedom to provide services, the right to strike automatically became subject to the principle of proportionality.

The guidelines of the Monti II Regulation were genuinely encouraging the Court to embrace social rights, including the right to strike. The crux of the matter appears to be that all trust for the Court’s decision-making has been broken and therefore it has been suggested that the legislator makes absolutely clear that social rights can trump economic rights and anything less will be written off as ‘not doing enough’. It is as if the academic doctrine is calling for a firm guarantee that in future case law economic freedoms will yield to social rights, specifically collective action. However, in reality, this is unfeasible as the concept of proportionality must be flexible in order to be an effective judicial tool. Its flexibility will depend on the degree of scrutiny to which it is applied, either strictly or in a broader manner, if it is the latter then the diversity of Member States’ laws will have a greater opportunity for being upheld. Moreover, the application of the proportionality test in national courts will inevitably be influenced by two variables: (i) the proportionality test may be implemented to varying degrees depending on the courts’ familiarity with the principle in general, for example, this will depend on the legal tradition⁶¹⁴ of the State and accordingly whether the principle is a new legal paradigm in which its usage may be more tentative compared to Member States in which it is a well-established part of the jurisprudence; and (ii) the application of the test specifically in the area of industrial action is uncharted territory in some Member States, “the notion of assessing the proportionality of collective action is entirely alien to the UK courts.”⁶¹⁵

Viking and *Laval* truly caused a fear amongst the academics and practitioners in this area, but it must be recognised that these judgments, which

⁶¹⁴ Hös, ‘The Principle of Proportionality in the *Viking* and *Laval* cases: An Appropriate Standard of Judicial Review?’, op. cit., 6.

⁶¹⁵ Novitz, ‘The impact of *Viking* and *Laval*. Contesting the social function and legal regulation of the right to strike’, op. cit., 267.

are albeit embedded in the psyche, have not been embedded into the construct of Union law – it must therefore be believed that the Court has both the power and the will to prioritise collective action over the fundamental freedoms where appropriate.

However, it has been concluded that the proposed Monti II Regulation will not be the legislative instrument by which the Court can exemplify its potential for greater balancing of the competing interests as the proposal has been withdrawn. There was an overwhelming negative response to the proposal, from the ETUC⁶¹⁶ and BusinessEurope,⁶¹⁷ but perhaps most substantially from the national Parliaments. For the first time since its introduction by the Lisbon Treaty, Parliaments of some of the Member States activated the so-called “yellow card” in accordance with Article 6 Subsidiarity Protocol,⁶¹⁸ which provides that any national Parliament may send a reasoned opinion stating why it considers a draft legislative act does not comply with the principle of subsidiarity. In the case of the proposed Monti II Regulation, twelve national Parliaments issued such an opinion thereby necessitating that the draft be reviewed. As a result, the Commission withdrew the proposed Monti II Regulation and, “in a letter to national parliaments, the Commission stated that... the reason for the withdrawal was the possible lack of the necessary political support for the proposal in the European Parliament and the Council in the future.”⁶¹⁹

This thesis can recognise the proposal’s shortcomings, yet it also stands by the conviction that Union legislation is far better off taking the route it has done here by stating that fundamental freedoms are equal to fundamental rights, as opposed to setting out in the legislation that one has primacy over the other. Furthermore, the legislation should not fundamentally change the position of economic freedoms as they are so core to the Union’s operation. Finally, the notion of primacy is a very delicate subject in Union law, as evidenced by the fact

⁶¹⁶ ETUC ‘ETUC Declaration on the Commission proposals for a Monti II Regulation and Enforcement Directive of the Posting of Workers Directive’, op. cit.

⁶¹⁷ BUSINESSEUROPE ‘Posting of Workers’ Policy Briefing 3 April 2012: <http://www.businessseurope.eu/Content/Default.asp?PageID=568&DocID=30086> [accessed 28 June 2013].

⁶¹⁸ Protocol (No. 2) on the Application of the Principles of Subsidiarity and Proportionality, annexed to the Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union of 2008, OJ C115/206, Article 6.

⁶¹⁹ Fabbrini and Granat, “‘Yellow Card, But No Foul’: The Role of the National Parliaments under the Subsidiarity Protocol and the Commission Proposal for an EU Regulation on the Right to Strike’, op. cit., 139.

that the Treaty does not explicitly refer to the “primacy” of Union law – placing it in the body of the text would be a very bold move – closer to the objectives of the unsuccessful Constitutional Treaty than the Lisbon Treaty. Thus, the only mention of primacy can be found in Declaration 17, which is attached to the Treaties and is non-binding. It states that the primacy of Union law is conditional on the Court’s well-settled decisions and therefore is not an absolute principle.

(vi) Interim Conclusion

Solution Number Two has presented the proposed Enforcement Directive and Monti II Regulation. The latter has now been withdrawn, however, the proposed Enforcement Directive still has the potential to be adopted.

The concept of an Enforcement Directive is welcomed, provided that it sufficiently enforces the Directive and does not enforce existing problems. The difficulty with revising the actual Directive itself is that there is no common European interest; as evidenced by the diverging interests of the European social partners.⁶²⁰ However, this thesis has the benefit of being free from the influence of political interests and therefore has not been swayed either by economic or social policy objectives; it is not beholden to stakeholders’ expectations and therefore experiences the luxury of autonomy. Accordingly, this thesis is able to generate a more balanced and holistic picture of the Directive and has consistently aimed to correctly identify the most pertinent issues, thereby presenting a clearer view of the most suitable and effective legislative solutions.

The Enforcement Directive was published at a time when all of Europe was feeling the economic recession; bringing workers in from abroad will always

⁶²⁰ The European social partners – BusinessEurope, CEEP, UEAPME and the ETUC – jointly worked on a report for over a year that focused on the consequences of the *Laval* Quartet, ‘Report on joint work of the European social partners on the ECJ rulings in the Viking, Laval, Rüffert and Luxembourg cases’ (19 March 2010). In the report, BusinessEurope insisted that there is no need to amend the Directive, supported the Court’s decisions stating that they provided legal certainty and entirely placed the burden on the Member States by claiming that any shortcomings were due to the implementation of the Directive at national level and, unsurprisingly, BusinessEurope advocated the implementation of unequal working conditions, “a climate of fair competition can be achieved even though workers are not subject to the exact same working conditions.” Whereas, the ETUC adopted an opposing stance, “the ETUC is of the opinion that *the four ECJ cases have further exposed the weaknesses of the current EU legal framework dealing with mobility of companies and service providers...* These weaknesses should therefore be urgently addressed.” The report can be accessed here: <http://www.busineurope.eu/DocShareNoFrame/docs/1/DECLMBICNHBGJAFDKDANKPOPDWD9DBWWY9LTE4Q/UNICE/docs/DLS/2010-00812-E.pdf> [accessed 4 June 2013].

be a sensitive topic, not least when local unemployment is at its highest. This atmosphere was not in favour of welcoming a proposal that would potentially show fervent support for the freedom to provide services in the form of workers from outside and that these workers would be granted greater clout in terms of protecting their rights when the national labour markets and rights of the national workers were at their most vulnerable. Nevertheless, it was time for the Commission to act, bearing in mind the “long wait” that had been endured in the lead up to the Commission’s proposal. Yet, the Commission’s proposal was reflective of the uncertain environment in which it was published as it did not fully commit to solving the problems of the Directive; it is incomplete and therefore this thesis emphatically submits that it should not be adopted in its current state. Ideally, the Directive itself needs to be revised so as to make a real difference.

Without wanting to over-simplify this technical and intricate area of law, the suggestions that have been proposed by all interested parties to date can bluntly be summarised as follows: the trade unions want to prioritise social rights and the legislator has maintained the priority of economic rights by leaving the legal basis untouched and in fact has reinforced it by emphasising the objectives of the Enforcement Directive solely in line with service provision. This thesis identifies these suggested solutions as a ‘pendulum approach’ in the way that these two forces are kept on opposing sides and one cannot succeed so long as favour has been granted to the other side. This same principle was eloquently expressed by Cherednychenko in the context of contract law and fundamental rights, but rather than relating to a pendulum the analogy of ‘walking in circles’ was adopted. Here, Cherednychenko suggests how to break free from walking in circles, “It is only when there is a *dialogue* between fundamental rights and contract law, rather than the subordination of contract law to fundamental rights, that major breakthroughs in our understanding of contractual justice may be achieved, and it is these breakthroughs, in providing new and better solutions, both in EU Member States’ national contract laws and in the nascent EU contract law, which will truly benefit weaker parties.”⁶²¹ This *dialogue* is also needed in

⁶²¹ Cherednychenko, ‘Subordinating Contract Law to Fundamental Rights: Towards a Major Breakthrough or towards Walking in Circles?’ in Grundmann (Editor), *Constitutional Values and European Contract Law* (2008) Private Law in European Context Series 13, Kluwer, 60.

the context of fundamental rights and freedoms; to break free from the pendulum approach this area needs a ‘shake-up’ to jolt the Court out of its previous interpretation. It is submitted that this will most effectively be achieved by changing the legal basis to provide balance and harmony as opposed to a legislative hierarchy. Accordingly, the Commission’s proposal will not effectively resolve the issue of walking in circles, therefore, the Enforcement Directive should not be adopted.

IV. Solution Number Three: No Changes to the Directive

Solution Number Three is the final solution to be considered in this Chapter and its premise is to rely solely on the legislative changes that have been made to the Union by the Lisbon Treaty, as opposed to making any amendments to the Directive. This section will initially analyse the impact of Article 6 TEU and whether the elevated status it has granted to social rights in the primary law is sufficient to rectify the issues of the Directive and finally, this section will review the posted worker cases since the *Laval* Triplet to decipher how far the Court has adjusted its interpretation in this area and accordingly, in light of these changes, whether an amendment to the Directive is still necessary.

(i) Article 6(1) TEU

The Lisbon Treaty came into force on 1 December 2009. It has made a number of changes to the Union’s constitutional and institutional frameworks, its external relations and EU policies.⁶²² The Social Policy Title of the TFEU is Title X; Articles 151 – 161 TFEU (ex Articles 136 – 145 EC Treaty). Article 152 TFEU is the new provision that establishes the objectives of the Union to include the role of social partners, including social dialogue and respecting their autonomy, and it takes into account the diversity of national systems. It also institutionalises the Tripartite Social Summit, stating that it will contribute to social dialogue. The promotion of social dialogue and respect for the differing national systems in the Treaties is imperative, however, arguably, the greatest contribution of the changes

⁶²² See generally Biondi, Eeckhout and Ripley (Editors), *EU Law After Lisbon* (2012) OUP.

made by the Lisbon Treaty to EU social policy has been the Charter of Fundamental Rights.

Article 6(1) TEU states, “The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union... which shall have the same legal values as the Treaties.” This provision grants the Charter legally binding status, thereby incorporating it into EU constitutional law. The Charter intends to make rights more visible, but it does not extend the scope of application of Union law beyond the powers of the Union and therefore it does not create new fundamental rights under national law as it only applies to Member States when they are implementing Union law.⁶²³ However, it is suggested that the limit on the application of the Charter does not necessarily have to be too limiting, “the scope of EU law, and thus the applicability of the Charter to national measures, may, with a little lawyerly or judicial imagination, be rendered very broad indeed.”⁶²⁴

Chapter IV Charter is the Solidarity Chapter, comprising Articles 27 – 38 Charter. Of particular importance is the right of collective bargaining and action, including strike action, under Article 28 Charter. Importantly, the Charter codifies civil, political, social and economic rights into one catalogue but this does not denote that all rights therein are of equal value, “The right of free access to a placement service is worthwhile no doubt (article 29 of the Charter) but it can hardly be seen as on the same level as the prohibition on slavery (article 5 of the Charter). To be sure, it might be argued that inclusion in a single document does not mean that they are being equated”.⁶²⁵ The issue with indivisibility is that a similar method of interpretation may be applied to all of the rights. However, there is a further distinction to be made; between rights and principles, “According to its Preamble, the Charter contains ‘rights, freedoms and principles,’ without identifying which provisions belong to which category.”⁶²⁶ Article 51(1) Charter prescribes, “respect the rights, observe the principles”, this is expanded on by Article 52(5) Charter which provides that principles may be implemented by

⁶²³ Article 51(1), Charter of Fundamental Rights of the European Union of 30 March 2010, OJ C83/389.

⁶²⁴ Anderson and Murphy, ‘The Charter of Fundamental Rights’ in Biondi, Eeckhout and Ripley (Editors), *EU Law After Lisbon* (2012) OUP, 165.

⁶²⁵ Chalmers, Davies & Monti, *European Union Law*, op. cit., 239.

⁶²⁶ Hinarejos, ‘Laval and Viking: the right to collective action versus EU fundamental freedoms’, op. cit., 723.

Union institutions and Member States when implementing Union law and “They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.” However, this condition does not extend to the application of rights. Therefore, the Charter does prescribe a difference in treatment but does not specify which provisions fall within the concept of either rights or principles, “In the absence of precise guidance, the distinction between rights and principles, though important, seems set to remain obscure and unpredictable.”⁶²⁷ Notably, Article 28 Charter refers to the *right* of collective bargaining and action and therefore, seemingly, gives rise to a direct claim for positive action by the Union’s institutions and Member States.

A further element of legal uncertainty introduced by the Charter, in respect of Article 28, is embodied in Protocol No. 30,⁶²⁸ which reflects how solidarity within the Union is adopted differently between the Member States and therefore the legal effect of solidarity rights in practice is undecided. Finally, the Charter does not have direct horizontal effect as Article 51(1) Charter does not mention private parties among those being bound by the Charter. Even if it could be argued that due to the way Article 28 Charter has been drafted, by addressing workers and employers, and so is capable of garnering some horizontal effect, the Charter’s origins reveal that it was not intended to be invoked horizontally, “From the start, emphasis was laid on the fact that the Charter is primarily addressed to the EU institutions, and that it is not in principle aimed at the Member States as such.”⁶²⁹ Clearly, the Charter has evolved since then so that now it directly addresses Member States when they are implementing Union law, but there is still no direct address to private parties.⁶³⁰

⁶²⁷ Anderson and Murphy, ‘The Charter of Fundamental Rights’, op. cit., 162.

⁶²⁸ Protocol (No. 30) on the Application of the Charter, op. cit.

⁶²⁹ Eeckhout, ‘The EU Charter of Fundamental Rights and the Federal Question’ (2002) CML Rev 39: 945-994, 952.

⁶³⁰ In the recent Opinion of AG Cruz Villalón, Case C-176/12 *Association de médiation sociale* [2013] ECR I-0000, delivered on 18 July 2013, [41], AG Cruz Villalón stated that just because Article 51(1) Charter does not directly address private parties, it cannot entail that this renders the Charter irrelevant in private law relations. This Opinion gave a very broad reading of the dispute at hand and concluded that Article 27 Charter, which was confirmed as being a “principle”, is embodied under Article 3(1) Directive 2002/14/EC establishing a general framework for informing and consulting employees in the Union, and may be invoked horizontally, which not only grants horizontal direct effect to the Directive but also to this principle of the Charter. This Opinion follows in the path created by *Mangold*, *Kücükdeveci* and *Prigge*, op. cit. However, this does not guarantee that the right embodied in Article 28 Charter will be treated in the same way, especially as the right to strike has not been given expression by any secondary Union legislation; the Monti I Regulation confirms that it falls outside the scope of Union competence and should be left

The Charter has been granted legally binding status since the *Laval* Triplet and therefore it is hoped that this will introduce a more social influence in the Court's future preliminary rulings. However, due to the aforementioned conditions which create prohibitions on the application of the Charter, the practical application of Article 28 Charter and the right of collective bargaining and action does not guarantee greater clout for the social partners in the European industrial relations context and cannot be relied upon alone; the Directive necessitates firm guarantees that there will be definite improvements.

(ii) *Article 6(2) TEU*

Article 6(2) TEU provides for EU accession to the ECHR, determining that the EU will have to be treated like any other Member and accordingly, the decisions of the ECtHR will have an even greater impact on the Union. *Demir and Baykara*⁶³¹ was decided in the Grand Chamber of the ECtHR on 12 November 2008; less than one year on from *Viking* and *Laval*. In the case, Mr Demir was a member of the Turkish trade union for civil servants 'Tüm Bel Sen' and Mrs Baykara was its President. Tüm Bel Sen had entered into a two year collective agreement with the Gaziantep Municipal Council concerning all aspects of the employees' working conditions. The Council had failed to adhere to all of the conditions, therefore, Mrs Baykara brought proceedings against it in the Gaziantep District Court. The District Court ruled in favour of the trade union, however, on appeal the Court of Cassation quashed that judgment on the basis that there is a right to form a trade union but the trade union did not have the authority to enter into collective agreements as the law stood. The District Court stood by its original judgment that the trade union had the right to enter into collective agreements as that accorded with the conventions of the ILO that Turkey had ratified. The Court of Cassation again quashed this decision. Then the Audit Court ordered that members of the trade union had to reimburse the additional income they had received as a result of the "defunct" collective agreement. Finally, the

untouched. Therefore, Article 28 Charter does not embody a general principle of EU law that has been given expression by a directive, it includes a right that comes outside the scope of Union law and, as aforementioned, the difference between rights and principles suggests a difference in treatment.

⁶³¹ *Demir and Baykara v Turkey*, op. cit.

trade union made an application to the ECtHR alleging breach of the freedom of association under Article 11 ECHR and protection against discrimination under Article 14 ECHR. It was held that Article 11 ECHR had been breached but there was no need to examine Article 14 ECHR, so the Turkish Government requested that the matter be referred to the Grand Chamber. The Grand Chamber, consisting of seventeen judges, unanimously held that there had been an unjustified and disproportionate breach of Article 11 ECHR on account of the failure to recognise the right of the Applicants to form a trade union and on account of the annulment of the collective agreement. The effect of this decision is that it “succeeded in putting a smile back on the faces of labour lawyers everywhere... the Grand Chamber of the European Court of Human Rights consciously and deliberately overruled its earlier decisions on the matter to hold that the right to freedom of association in article 11 of the European Convention on Human Rights (ECHR) now includes the right to collective bargaining.”⁶³²

The significance of *Demir and Baykara* cannot be underestimated, “it is a decision in which human rights have established their superiority over economic irrationalism and ‘competitiveness’ in the battle for the soul of labour law”.⁶³³ However, it must be asked how this can have a positive impact on resolving the Directive? The EU’s accession to the ECHR is intended but, equally, it has been anticipated since 2009. So the likelihood is that it will not be imminent. Nevertheless, there is a great deal of promise in paragraph 157 of *Demir and Baykara* which necessitates legislation to give effect to the provisions of international labour conventions, “The decision in *Demir* thus creates the alluring possibility of complaints being made in the Strasbourg Court against an EU Member State about the latter’s failure to comply with the ECHR because of obligations arising under EU law.”⁶³⁴ The case established that Article 11 ECHR is the yardstick by which the right of collective bargaining must be assessed. Every Member State of the Union is a Member of the ECHR and both the Charter’s Preamble and Article 6(3) TEU reaffirm that the ECHR constitutes a general principle of Union law, which has been granted expression by Article 12

⁶³² Preface by Ewing in Bercusson, *European Labour Law*, op. cit.

⁶³³ Ewing and Hendy, ‘The dramatic implications of *Demir and Baykara*’ (2010) ILJ, 39(1): 2-51, 47.

⁶³⁴ Preface by Ewing in Bercusson, *European Labour Law*, op. cit.

Charter on the freedom of assembly and of association and Article 28 Charter on the right of collective bargaining and action.

Five months later, seven ECtHR judges confirmed that *Demir and Baykara* was not an aberration by unanimously ruling in *Enerji Yapi-Yol Sen*⁶³⁵ that Article 11 ECHR also protects the right to strike, “This link is obvious on examination of the realities of collective industrial relations. Without the right to strike, the right to collectively bargain is no more than a right to collective begging.”⁶³⁶ This case, also from Turkey, concerned a ban preventing public sector employees from taking part in a one day national strike in support of the right to a collective bargaining agreement. Some of the Enerji Yapi-Yol Sen trade union’s members took part in the strike and received disciplinary sanctions as a result. The trade union alleged that the Turkish authorities had violated Article 11 ECHR and the ECtHR, in reference to its earlier judgment in *Demir and Baykara*, agreed with the trade union. The ECtHR acknowledged that the right to strike is not absolute⁶³⁷ and is subject to the limitations under Article 11(2) ECHR.

These cases have satisfactorily endorsed the right of collective bargaining and action which must be acknowledged by the ECJ in light of the future accession to the ECHR and the provision under Article 6(3) TEU.

(iii) *Article 6(3) TEU*

This provision states that the fundamental rights guaranteed by the ECHR and the constitutional traditions common to the Member States shall constitute general principles of the Union’s law. As the Member States’ constitutional principles are part of the body of Union law, the Court must not diverge too far from those values. The right to strike has constitutional significance in some Member States and therefore should not be underplayed. In order to achieve this, it is necessary to alter the perspective by which these labour rights are viewed, and indeed, labelled, “One approach is to seek to persuade the Court to attach more weight to the employment protection issues involved, for example by arguing that the matters of employment protection listed in the Posted Workers Directive are matters of

⁶³⁵ *Enerji Yapi-Yol Sen v Turkey*, op. cit.

⁶³⁶ Ewing and Hendy, ‘The dramatic implications of *Demir and Baykara*’, op. cit., 13.

⁶³⁷ *Enerji Yapi-Yol Sen v Turkey*, op. cit., [32].

human rights, rather than ‘merely’ workers’ interests.”⁶³⁸ Accordingly, what makes labour rights transcend the limits of ‘merely’ workers’ interests? A positivistic approach provides that, “If labour rights are incorporated in human rights documents, they are human rights.”⁶³⁹ Therefore, there is scope to support this premise in respect of the Charter, the ECHR and the fact that in 1998 the ILO adopted the Declaration of Fundamental Principles and Rights at Work which includes the freedom of association and the effective recognition of the right to collective bargaining, embodied under ILO Convention No. 87 and No. 98, as one of the four rights that are to be recognised as fundamental human rights by the ILO Member States, even if the State has not ratified the relevant Convention Numbers. However, the practical application of fundamental rights in private law will inevitably differ from that of labour rights, also, when there is a clash with an economic fundamental freedom, the Court will subject these rights to the principle of proportionality, as endorsed by Article 52(1) Charter.

When trade union collective action comes up against the fundamental freedom to provide services in the context of posted workers, the services are likely to prevail as the Court’s hands are tied by the legal basis and the fact that it does not come within the EU’s competence all contribute to it being a ‘quieter’ right in the Court. Therefore, unless the legal basis changes, it is necessary to rely on something else, such as constitutional principles, which would be a stronger ‘contender’ against service provision. If the social right is granted constitutional value, the Court would have to apply a stricter scrutiny in derogating from that right⁶⁴⁰ as constitutional law warrants a special scrutiny by the Court, whereas ordinary law simply requires ordinary principles of interpretation.

In *BECTU*⁶⁴¹ it was held that the right to paid annual leave is a social right conferred directly on all workers by Union law. The UK Working Time Regulations specified that the right to paid annual leave did not arise until the worker had completed a minimum of thirteen weeks uninterrupted employment with the same employer. However, BECTU is a trade union representing workers in the broadcasting, film, theatre, cinema and related sectors in which employment is usually based on short-term contracts, often less than thirteen weeks. The Court

⁶³⁸ McCrudden, ‘The *Rüffert* Case and Public Procurement’, op. cit., 133.

⁶³⁹ Mantouvalou, ‘Are Labour Rights Human Rights?’ (2012) ELLJ, 3: 151-172, 151.

⁶⁴⁰ As revealed by the treatment of the constitutional right to human dignity in *Omega*, op. cit.

⁶⁴¹ Case C-173/99 *BECTU* [2001] ECR I-4881.

referred to the Community Charter of the Fundamental Social Rights of Workers which cites that every worker in the Union must enjoy satisfactory health and safety conditions at work and every worker is entitled to paid annual leave, “It follows that the entitlement of every worker to paid annual leave must be regarded as a particularly important principle of Community social law from which there can be no derogations”.⁶⁴² Importantly, Directive 93/104 concerning certain aspects of the organisation of working time gives expression to this general principle of Union law. The entitlement to paid annual leave as a fundamental right has since been confirmed by Article 31(2) Charter.

The main lesson to be learnt from BECTU is that the social right at issue was embodied in Directive 93/104 which gave expression to the general principle, however, the right to strike is not provided for in the Posted Workers Directive. Article 28 Charter has given expression to the right of collective bargaining and action, however, Article 1(2) Protocol No. 30 provides the following, “nothing in Title IV [the Solidarity Title] of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law.” The UK does not legally recognise the right to strike,⁶⁴³ therefore, this would negate a justiciable right, in accordance with the abovementioned Protocol in the UK, and unless it can substantially improve conditions for the posting of workers in all Member States, this thesis will not consider the solution as a viable option. Also, BECTU was a public law case, whereas posted worker cases can come under both public⁶⁴⁴ or private⁶⁴⁵ law and the issue of the place of constitutional principles and fundamental rights in private law adds another layer of uncertainty. Finally, in BECTU it was very clear as to the right that was being protected: the entitlement to paid annual leave, however, in the case of posted workers, it is not only the right to strike that has been neglected, but also a respect for the differing national labour systems and methods of extending the host State’s laws to posted workers via different methods of applying collective agreements and so on; the issues are numerous and therefore it is difficult to pin-point the main issue that could be

⁶⁴² Ibid., [43].

⁶⁴³ Section 219 TULCRA 1992 Act offers protection from certain tort liabilities, but formally, the common law does not confer the right to strike in the UK.

⁶⁴⁴ Rüffert, *op. cit.*

⁶⁴⁵ Laval, *op. cit.*

granted more weight by the support of a constitutional principle or fundamental right. In short, the posting of workers has revealed itself to be so unique and steeped in its own very specific issues that Solution Number Three is not showing itself to be the most suitable or effective legislative solution. However, there is still one final avenue that needs to be considered and that is the role of the Court.

(iv) The Court's "Newer" Approach?

Kilpatrick described the Court's interpretation of the Directive in the *Laval* Triplet as taking a "new approach".⁶⁴⁶ It is submitted that the Court needs to revise this new approach as it has proved itself to be overwhelmingly unsatisfactory; the Court only upheld the freedom to provide services and therefore revealed that in respect of fair competition and workers' rights, the Directive adds very little.

The question that will be answered in this section is whether the Court alone can resolve the issues of the Directive. This will require a change in the Court's interpretation in light of social issues, which will hopefully now be possible due to the legitimate expression that has been granted to social rights by the Lisbon Treaty. In order to examine this question, this section will initially analyse the case law on posted workers following the *Laval* Triplet; three cases from the ECJ and two cases from the EFTA Court, and will conclude with an assessment of the Court's role as constitutional adjudicator.

The case of *Commission v Germany*⁶⁴⁷ was decided on 21 January 2010, one year and a half after the final case in the *Laval* Triplet.⁶⁴⁸ This case, that concerned transitional measures and the posting of workers from Poland to Germany, showed that the Court's interpretation in this area has evolved from the *Laval* Triplet as it exemplified that whilst it is imperative to maintain the importance of Article 56 TFEU, account must also be taken of the effects this has on the domestic labour market.

The first point of complaint from the Commission was in respect of Article 1(1) of the German-Polish Agreement which provides that work permits shall be issued to Polish posted workers in respect of a "works contract between a Polish

⁶⁴⁶ Kilpatrick, 'Laval's regulatory conundrum: collective standard-setting and the Court's new approach to posted workers', op. cit.

⁶⁴⁷ Case C-546/07 *Commission v Germany* [2010] ECR I-439.

⁶⁴⁸ C-319/06 *Commission v Luxembourg*, op. cit.

employer and an undertaking from the other side”. Germany had interpreted the expression “undertaking from the other side” as referring only to German undertakings. The effect of this interpretation was that only undertakings that were established in Germany and wished to carry out work there could conclude contracts with a Polish contractor and thereby benefit from the quota of Polish workers guaranteed under the Agreement. Therefore, undertakings from other Member States would have had to set up a subsidiary in Germany in order to comply with this interpretation. The Court held that this is a restriction of Article 56 TFEU.

The second complaint from the Commission was that the labour market protection clause in Leaflet 16a infringed the ‘standstill’ clause under Chapter 2, paragraph 13, Annex XII to the Act of Accession. Leaflet 16a concerns employment of foreign workers from new Member States undertaking work contracts in Germany. It contains a labour market protection clause which states that where the average unemployment rate in districts of the Federal Employment Agency have been at least 30% higher for the previous six months than the average unemployment rate in Germany, work contracts involving foreign workers are generally prohibited. The standstill clause specifies that Germany and Austria may, after notifying the Commission, derogate from Article 56 TFEU in order to limit the number of posted workers established in Poland, whose right to take up work in the host State is subject to national measures. The objective of this derogation is stated as addressing “serious disturbances or the threat thereof in specific sensitive service sectors on their labour markets, which could arise in certain regions from the transnational provision of services, as defined in Article 1 of Directive 96/71/EC”. Clearly this is directly discriminatory, however, as it is provided for in the Act of Accession, the standstill clause only applies for a limited time. The clause also provides that the conditions between the posted workers from Poland and Germany and Austria shall not be more restrictive than those applicable on the date of signature of the Treaty of Accession; acceding to the Union should ease movement in the internal market and this ‘transitory stage’ provides a compromise for both sides until time has evened the balance. However, the issue from the Commission in this case was that since 16 April 2003, the date of signature of the Treaty of Accession of Poland to the EU, ten new districts were added to the list of districts subject to the labour market

protection clause in Leaflet 16a, therefore, in essence, this made access to the German labour market harder for posted workers from Poland since 16 April 2003, which effectively infringed the standstill clause.

It is submitted that the growing rate of unemployment is an unfortunate yet very real sign of the times, for which of course the service providers in Poland should not be punished, yet the labour markets in the host States that are already suffering require increased protection. There will inevitably be an increased risk of an abuse of this law resulting in national protectionism. However, Germany maintained that there has been no negative change in the legal situation or administrative practice as regards Poland since 16 April 2003; the only change has been that of the German labour market. The Court considered that the labour market protection clause in Leaflet 16a cannot infringe the standstill clause as the very purpose of that clause “is designed to enable the Federal Republic of Germany to address serious disturbances, or the threat thereof, in specific sensitive service sectors on its labour market”⁶⁴⁹ which reflects the context of the current labour market. The factual situation has changed, but the terms and conditions applicable to posted workers have remained identical. Accordingly, the Court held that the second complaint must be rejected as unfounded.

The judgment did not focus on the interpretation of the Directive per se, but the case does reveal a less stringent approach by the Court in the context of posted workers. The Court showed more willing to protect the national labour markets in times of economic crisis; even if this has the effect of restricting the freedom to provide services.

*Santos Palhota*⁶⁵⁰ was decided on 7 October 2010 and one of its main features is that AG Cruz Villalón used the case as a platform in his Opinion⁶⁵¹ to advocate the changes that have been made to EU constitutional law. It is clear that with the coming into force of the Lisbon Treaty and the consequent binding effect of the Charter, there was an atmosphere of expectation that the Union was embarking upon a determined evolution of the importance of EU social rights. The AG engaged with this changing atmosphere and, in what can only be seen as a warning to the Court, stressed this point, “As a result of the entry into force of

⁶⁴⁹ C-546/07 *Commission v Germany*, op. cit., [62].

⁶⁵⁰ Case C-515/08 *Vitor Manuel dos Santos Palhota and Others* [2010] ECR I-9133.

⁶⁵¹ AG Opinion *Santos Palhota*, op. cit.

the Treaty of Lisbon, when working conditions constitute an overriding reason relating to the public interest justifying a derogation from the freedom to provide services, they must no longer be interpreted strictly.”⁶⁵² Therefore, the social protection measures should not just be viewed as an “exception” or “derogation” from the primary goal of securing the fundamental freedoms, but the perspective needs to change in order to reflect that social rights also form an objective of Union law.

The facts of the case are as follows: a Portuguese undertaking posted Portuguese welders and fitters to work on ships in Belgium. During an inspection of the shipyard, it was found that 53 Portuguese posted workers had not exercised the prior declaration of posting, as required under Belgian national law. However, the process for the prior declaration involved the Belgian authorities certifying receipt and approval of the declaration within five working days from the date on which it was received by sending a registration number for the declaration to the service provider. The posted workers could only start their employment in the host State following the date when the registration number had been notified, if this was not complied with, the service provider could not benefit from the simplified regime but was required, under Belgian law, to draw up Belgian social documents, such as the individual account and payslip. The Court held that the provision of a prior declaration subject to the issue of an administrative licence is precluded by Articles 56 and 57 TFEU. The Court provided alternative measures, such as a requirement on the service provider “to report beforehand to the local authorities on the presence of one or more deployed workers, the anticipated duration of their presence and the provision or provisions of services justifying the deployment.”⁶⁵³ This would still have the effect of the prior declaration but would not be as restrictive as the additional requirement of the work licensing mechanism, and would therefore be a more proportionate measure to ensure compliance with the social welfare and wages legislation of the host State.

The second issue was the obligation under Belgian national law on service providers to keep copies of documents equivalent to the individual account and payslip available to the Belgian authorities during the posting and then, where a posting has lasted a minimum of six months, following that posting the service

⁶⁵² Ibid., [53].

⁶⁵³ *Santos Palhota*, op. cit., [51].

provider must send those documents to the Belgian authorities and keep them available for five years. The justification for keeping documents at the relevant authorities ensures monitoring compliance with the terms and conditions of employment applicable to posted workers. The Court held that such measures are proportionate to the aim of protecting workers. This shows real progress on the part of the Court from the *Laval* Triplet; the obligation to keep documents during and after the posting with the relevant national authorities is clearly an additional administrative and economic burden on the service provider and therefore restricts the freedom to provide services, nevertheless, the Court held that it is justified and proportionate in the interests of protecting workers. In 1999 the Court held that the host State cannot impose an obligation on the service provider to retain certain documents for a period of 5 years following the period of posting,⁶⁵⁴ therefore, this shows a tangible shift in the Court's interpretation of the Directive back to the legislator's original intention.

However, the issue with this case is that the Court did not explicitly address the social changes introduced by the Lisbon Treaty that AG Cruz Villalón thoroughly explored and advocated in his Opinion. AG Cruz Villalón drew attention to the guarantee of adequate social protection under Article 9 TFEU, the social market economy aiming at full employment and social progress under Article 3(3) TEU and fair and just working conditions under Article 31 Charter. The AG specified that “since 1 December 2009, when the Treaty of Lisbon entered into force, it has been necessary to take into account a number of provisions of primary social law which affect the framework of the fundamental freedoms. Specifically, the posting of workers, in so far as it may alter the amplitude of the freedom to provide services, must be interpreted in the light of the social provisions introduced by that Treaty.”⁶⁵⁵ Dagilyte⁶⁵⁶ proposed that the Court's silence on the AG voicing the ‘new social era’ could be due to the fact that proposals for revising the Directive had been adopted prior to this case,⁶⁵⁷ or, perhaps the Court did not want to step onto the legislator's territory. It is

⁶⁵⁴ *Arblade and Leloup*, op. cit.

⁶⁵⁵ AG Opinion *Santos Palhota*, op. cit., [51].

⁶⁵⁶ Dagilyte, ‘Social Values In The European Union: Are They Becoming More Important After The Lisbon Treaty? Some Comments on C-515/08 Santos Palhota and Others’ (2 December 2010) ‘Europe on the Strand’ blog for the Jean Monnet Centre of Excellence at King's College London.

⁶⁵⁷ ETUC, ‘The Posting of Workers Directive: proposals for revision’: <http://www.etuc.org/a/7044> [accessed 16 January 2013].

submitted that both of these reasons are plausible, however, it is interesting to note that despite not advocating the new social era as avidly as the AG, the Court's ruling in *Santos Palhota* was in fact more lenient than the AG's Opinion. The AG specified that service providers may draw up copies of documents that are equivalent to those that must be drawn up in the host State, but it is not permitted to keep the documents after the period of posting has ceased, neither is it permitted to require the documents specifically whereby the period of posting lasts more than six months as it unjustifiably restricts Articles 56 and 57 TFEU, whereas the Court did not make such distinctions.

In this next case, decided on 10 February 2011, the Court confirmed the precedent set by *Commission v Germany*, as seen above, and showed deference to the interests of protecting the host State's labour market during the transitional period despite the apparent restriction to the freedom to provide services. In *Vicoplus*⁶⁵⁸ the Minister for Social Affairs and Employment imposed fines on the Polish companies Vicoplus, BAM Vermeer and Olbek for posting Polish workers to the Netherlands without first having obtained work permits. Dutch national law imposed an obligation to obtain work permits, the referring court opined this was a temporary restriction on the free movement of Polish workers provided for in Annex XII to the 2003 Act of Accession. At the time of the events in the main proceedings, the transitional provisions of the 2003 Act of Accession applied a derogation from the freedom of movement for workers but not, as regards the Netherlands, from the freedom to provide services in respect of posted workers. The issue is that the national law required a work permit specifically for hired out workers, as referred to under Article 1(3)(c) Directive. Accordingly, it needed to be determined whether such a restriction may be justified by the general interest objective of protecting the domestic labour market against, *inter alia*, circumvention of the restrictions on the free movement of workers.

The referring court asked whether Articles 56 and 57 TFEU preclude the national legislation. In particular, the referring court raised the question in light of the concept of 'making available of workers' and accordingly the nature of the main activity of the service provider. There clearly is a distinction between the

⁶⁵⁸ Case C-307/09 *Vicoplus SC PUH (C-307/09)*, *BAM Vermeer Contracting sp. Zoo (C-308/09)* and *Olbek Industrial Services sp. Zoo (C-309/09) v Minister van Sociale Zaken en Werkgelegenheid* [2011] ECR I-453.

making available of workers, in the form of hiring-out workers, and posted workers, “the hiring-out of manpower constitutes a provision of services of a special nature, because it is characterised by its objective which is to enable workers to gain access to the labour market of the host Member State. From that angle, the hiring-out of workers... cannot be totally isolated from the problems connected with freedom of movement for workers within the EU.”⁶⁵⁹ The hiring-out of workers is particularly interesting because they are sent to a host State under the provision of service of their employer, in the same way as posted workers, however, unlike posted workers, once in the host State, workers that are hired out work under the control and direction of the user undertaking. Nevertheless, paragraph 35 of the Court’s judgment reinstated AG Bot’s Opinion, “I consider it artificial to draw a distinction according to whether a worker gains access to the employment market of the host Member State directly and independently or through an undertaking which hires out manpower. In both cases, in fact, there are potentially large movements of workers which, following new accessions, risk disturbing the employment market of the Member States.”⁶⁶⁰ Therefore, both the Court and the AG concluded that to exclude the hiring-out of workers from the scope of the Act of Accession, just because their access to the labour market may differ from that of the stereotypical posted workers, would deprive the objective of the transitional provision of much of its effectiveness. The Court held that, during the transitional period, Articles 56 and 57 TFEU do not preclude the national law that imposes the hiring-out of workers who are Polish nationals subject to obtaining a work permit.

This again is a very progressive ruling that has revealed access to the host State’s labour market upholds a more definite and impenetrable border for typical posted workers in comparison to hired out workers, that is why the Court’s ruling to uphold the transitional measures in this context in order to protect the domestic labour market was so crucial.

The final two cases to be considered both come from the EFTA Court. *ESA v Iceland*⁶⁶¹ was decided on 28 June 2011. The case concerned a potential failure of Iceland to fulfil its obligations under Article 36 EEA Agreement (on the

⁶⁵⁹ AG Opinion *Vicoplus*, op.cit., [43].

⁶⁶⁰ *Ibid.*, [51].

⁶⁶¹ Case E-12/10 *EFTA Surveillance Authority v Iceland* [2011].

freedom to provide services) and Article 3 Directive. In particular, it was considered whether a right to payment for sick leave under Article 5 Icelandic Posting Act constitutes an element of the minimum rate of pay under Article 3(1)(c) Directive. In view of the EFTA Surveillance Authority (ESA), the payment for sick leave does not constitute remuneration for work carried out; it only arises under the condition where a worker is sick. The ESA argued that this constitutes a restriction on the freedom to provide services as imposing requirements on matters outside of Article 3(1) Directive is liable to “make it less attractive or more difficult to carry out work in the host State”.⁶⁶² Such a restriction may only be justified under the exception for public policy in accordance with Article 3(10) Directive which the ESA does not see as applicable in this case. Iceland argued that the payment for sick leave is included under the ‘minimum rates of pay’ as the Directive provides that the concept of minimum rate of pay is defined by the law and/or practice of the State in which the posting takes place and therefore Iceland argued that it is their prerogative. The ESA also contested Article 7 Icelandic Posting Act which imposes an obligation on the employer to take out accident insurance for posted workers which again makes it less attractive or more difficult to undertake service provision. The EFTA Court held that these provisions are incompatible with the Directive and Iceland has failed to establish that the disputed provisions are necessary to counteract a genuine and sufficiently serious threat to a fundamental interest of society and therefore a justification under public policy is not available.

The issue with this case is that the Directive does specify that the notion of the minimum rate is to be set by the host State, accordingly, it is submitted that what the EFTA Court really took exception to here was the fact that Article 5 Icelandic Posting Act does not set the sickness pay at a minimum level, also, Iceland stated that “the requirements at issue are established in collective agreements which are legally protected... The objective of the legislation is to provide worker protection; a recognised objective under EEA law.”⁶⁶³ At worst, it can be deduced that as the provision was not set at the minimum level and it was provided for in collective agreements (as opposed to a statutory condition) for the purpose of protecting workers, the EFTA Court dismissed the contested Article on

⁶⁶² Ibid., [30].

⁶⁶³ Ibid., [34].

the basis that it ultimately makes service provision less attractive; this shows a significant step back for the interpretation of the Directive. Or, at best and in the alternative, the EFTA Court genuinely concluded, following a detailed examination of the purpose of these requirements that entitlement to pay in the event of illness or accident comprises a social security benefit, not payment for work undertaken. Either option can logically be argued, however, the main conclusion to take from a case such as *ESA v Iceland* is that the Directive still presents uncertainties leading to dubious judgments that may well serve the sole purpose of maintaining the freedom to provide services above all else, reminiscent of the *Laval Triplet*. Therefore, the Directive itself still requires amendment.

The final case to be considered is *STX Norway*⁶⁶⁴ which was decided by the EFTA Court on 23 January 2012. STX Norway and eight other companies (shipyards) brought this action against the Norwegian State by claiming that the Tariff Board Regulation that grants universal application to various clauses of the Engineering Industry collective agreement in the maritime construction industry was in breach of Article 36 EEA Agreement and Article 3 Directive and the shipyards sought compensation in this respect. The clauses that were granted universal application concerned the minimum rate of pay, maximum working hours, remuneration for work assignments requiring overtime, shift-work and overnight stays away from home and compensation for expenses. The effect of making the collective agreement universally applicable was to ensure that posted workers and workers established in Norway are entitled to the same wage and working conditions. Unfortunately, the EFTA Court adopted the “new approach” of the ECJ, as seen in the *Laval Triplet*, and maintained that, in the interests of service provision, obliging the service provider to provide expenses for travel, board and lodging in connection to the period of posting is not provided for under Article 3(1) Directive and therefore it can only be justified by public policy grounds under Article 3(10) Directive. The EFTA Court also held that the compensation for overnight stays away from home is, in principle, a restriction of the freedom to provide service under Article 36 EEA Agreement, yet the national authorities or courts of the host EEA State may determine whether the provision fulfils a public interest objective. Finally, the EFTA Court held that in respect of

⁶⁶⁴ Case E-2/11 *STX Norway Offshore AS and Others v The Norwegian State* [2012].

awarding posted workers improved protection on working time, this is not strictly precluded by Article 3(1) Directive.

Is this the *Laval* of Norway? This decision was made two months prior to the publication of the proposed Enforcement Directive and during the same month when the Danish Presidency of the Council of the EU vowed to pay special attention to the forthcoming proposal to resolve the problems associated with the Directive.⁶⁶⁵ Consequently, this decision enforced an interpretation that the political will of the Union was working hard to avoid.

Fortunately for *STX Norway*, the decision was not corroborated by the national court, unlike in *Laval* whereby the Swedish Labour Court's judgment was seemingly just as tough. The Norwegian Court of Appeal ruled in favour of the Norwegian State as it held that the decision to make the collective agreement universally applicable and therefore impose higher employment conditions on the service provider was not in breach of the EEA Agreement. Following this decision, STX Norway and the other shipyards took the case to the Supreme Court of Norway which also ruled in favour of the Norwegian State on all counts and held that any additional obligations do not exceed what is necessary to fulfil the objective of attaining social protection for posted workers.

This case, which had been “lingering in the Norwegian court system since 2009”⁶⁶⁶ finally arrived at a broad interpretation of the hardcore list of mandatory terms set out under Article 3(1) Directive in the interests of maintaining worker protection. However, it is clear that despite the progressive decisions of the ECJ set out above, and despite the plethora of criticism of the way in which the Directive was interpreted in the *Laval* Triplet, these two EFTA Court decisions prove that the issues with the Directive are ingrained; revealing a disconcerting sign of history repeating itself with one step forward and two steps back.⁶⁶⁷

(v) *The Court's Role*

⁶⁶⁵ Europolitics ‘Posting of workers at heart of priorities’, op. cit.

⁶⁶⁶ European Industrial Relations Observatory On-line ‘Supreme Court rules in favour of equal treatment for foreign workers in shipyards’ 13 June 2013: <http://eurofound.europa.eu/eiro/2013/04/articles/no1304019i.htm> [accessed 3 September 2013].

⁶⁶⁷ Davies, ‘One Step Forward, Two Steps Back? The *Viking* and *Laval* Cases in the ECJ’, op. cit.

This section set out to answer whether the Court alone can solve the issues of the Directive. The Court's role in shaping the general principles of Union law is unbounded, "The social policy cases, with their direct impact on individuals, therefore presented the Court of Justice with the opportunity to develop important principles, such as the direct effect of directives⁶⁶⁸ and even general principles of law."^{669,670} The Court is the constitutional adjudicator of the Union and its inspiration in adhering to the general principles of Union law stems from the fundamental rights under the ECHR and the constitutional traditions common to the Member States, "In short, the general principles of law are children of national law but, as brought up by the Court, they become *enfants terribles*: they are extended, narrowed, restated, transformed by a creative and eclectic judicial process."⁶⁷¹ Thus, the elements adopted from the Member States' laws are reshaped to fit into the mould of the Union's interests.

Social policy clearly forms part of the Union's interests; the Court has recognised the protection of fundamental rights as a general principle of Union law that has constitutional status⁶⁷² and the evolutionary developments that have been made to EU law since the *Laval Triplet* "should shape a new legal context".⁶⁷³ Recently, the Grand Chamber of the Court determined⁶⁷⁴ the field of application of the Charter as binding on the Member States whenever they are acting within the scope of EU law. Accordingly, the Court's jurisprudence cannot be underestimated and the voice of the Court will have an influence regarding the attitude towards social rights and the way in which the Treaties and the Directive are interpreted, for example, if the Court established a commitment to a more convincing social interpretation, that attitude can become embedded in the way the legislation is viewed.

The Court's policy-making role is therefore recognised by this thesis; which is also highlighted by the extensive impact the cases of the *Laval Triplet*

⁶⁶⁸ *Marshall; Foster v British Gas*, op. cit.

⁶⁶⁹ *Mangold; Küçükdeveci*, op. cit. See Kilpatrick, 'The ECJ and Labour Law: A 2008 Retrospective', op. cit.

⁶⁷⁰ Barnard, 'EU 'Social' Policy: From Employment Law to Labour Market Reform', op. cit., 662.

⁶⁷¹ Tridimas, *The General Principles of EU Law*, op. cit., 6.

⁶⁷² *Ibid.*

⁶⁷³ Report to the Commission, 'A New Strategy for the Single Market: At the Service of Europe's Economy and Society', op. cit., Section 3.2.

⁶⁷⁴ Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* [2013] ECR I-0000, judgment of 26 February 2013, nyr.

have had on Union law. However, the difficulty specific to this context is that if the Directive itself is not amended, the Court cannot be expected to reshape the law without the legislative impetus and go against its previous rulings.⁶⁷⁵ This is particularly true in regard to the legal basis; the Court is required to uphold the Treaties and interpret them accordingly⁶⁷⁶ and in light of the current Treaty provision forming the Directive's legal basis the Court is restricted in departing too far from upholding the freedom to provide services.

In conclusion, the improvement of the Directive should not be longed for by anticipating a future preliminary reference and, as seen by the EFTA Court judgments above, the scope of judicial interpretation will always leave a margin of uncertainty. Therefore, as this situation has reached its breaking point, it is submitted that for real change to be realised, a revision of the Directive is required which necessitates a voice from the legislator, not the Court.

(vi) Interim Conclusion

Since the *Laval* Triplet there have been substantial changes to the Union's primary law, a Union bill of rights in the form of the Charter, a leap forward for the right of collective bargaining and action under Article 11 ECHR by the ECtHR and an axiomatic shift in the interpretation of the ECJ in the context of posted workers. Solution Number Three has therefore asked: are these changes alone enough to rectify the issues associated with the Directive so that the initial impetus to amend the Directive has been made obsolete? The answer is an unequivocal no.

It is true that Article 6(1) TEU grants legally binding status to the Charter, however, the practical application of Article 28 Charter is not a strong enough guarantee that this will truly bolster the interests of trade unions in the case of posted workers. Also, in light of the positive interpretation of Article 11 ECHR, to claim that an improvement to the right of collective bargaining and action will resolve all of the issues of the Directive presents a very one-dimensional view of

⁶⁷⁵ One of the very rare occasions in which the Court explicitly went against its previous rulings can be seen in *Keck*, "By contrast, contrary to what has previously been decided..." Joined Cases C-267/91 and C-268/91 *Keck* [1993] ECR I-6097, [16]. However, this decision revolutionised the scope of the free movement of goods and it does not appear that the Court has shown such intentions in terms of the free movement of services.

⁶⁷⁶ Article 19, TEU.

the legislation's problems. This section also considered that even if labour rights can be argued to constitute fundamental human rights they will still be made subject to the principle of proportionality when up against a fundamental freedom in the Court and, in light of the legal basis, there is an automatic leaning in favour of the fundamental freedom. The difficulty with bolstering the significance of labour rights with a constitutional right of a Member State is that the constitutional principles of the Member States are unique and therefore, "the Court... prefers to avoid citing national constitutions for reason of the considerable differences between them."⁶⁷⁷

The ECJ showed willing to move on from its previous interpretation of the Directive to reveal a newer approach. In both *Commission v Germany* and *Vicoplus* the Court upheld the transitional measures, thereby showing deference to the interests of protecting the host State's labour market, despite the apparent restriction to the freedom to provide services. In *Santos Palhota* the Court held that a prior declaration is proportionate but the specific requirement of the work licensing mechanism under Belgian national law is not, however, in *Commission v Germany*⁶⁷⁸ the Court held that the obligation to make a prior declaration was an unjustified restriction on the freedom to provide services, thus, the Court has developed its jurisprudence in this area. Also, the Court upheld the second requirement on service providers to keep copies of documents available in the host State during the posting and then to send copies of those documents on completion of the posting, in the interests of worker protection, which also goes against its previous jurisprudence.⁶⁷⁹ Despite these developments, ultimately, real change cannot be achieved at the level of the Court as revealed by the EFTA Court's interpretation in both *ESA v Iceland* and *STX Norway* that highlighted the issues with the Directive are intrinsic. These findings prove that in order to rectify the issues identified in Chapter 2, changes to the primary law of the Union and potential for a differing interpretation from the Court is not enough of a solid guarantee that this alone will improve the Directive.

V. Conclusion

⁶⁷⁷ Morijn, 'Balancing Fundamental Rights and Common Market Freedoms in Union Law: Schmidberger and Omega in the Light of the European Constitution', op. cit., 18.

⁶⁷⁸ C-490/04 *Commission v Germany*, op. cit.

⁶⁷⁹ *Arblade and Leloup*, op. cit.

This Chapter has reviewed three separate solutions to rectify the issues of the Directive: (i) amend the Directive; or (ii) adopt the Enforcement Directive; or (iii) no changes to the Directive. Potentially, there could be a Solution Number Four which would remove the Directive altogether so that posted workers would be governed by something else pre-existing.

Before 1996 there was no Posted Workers Directive and the choice of applicable law was influenced by private international law under the 1980 Rome Convention, “the Rome Convention of 1980 on the law applicable to contractual obligations already permitted host states to apply parts of their national labour law systems (under the guise of ‘mandatory requirements’) to posted workers whose contracts were governed by home state law.”⁶⁸⁰ However, the option of extending the host State’s laws via the mandatory requirements is not a guarantee, as opposed to the Directive which obliges the host State to extend the core provisions of their labour laws to posted workers, accordingly, “The benefit to out-of-state service providers of the Directive was that it harmonised the list of mandatory requirements (though not their content) across the Member States.”⁶⁸¹ Also, as a posted worker is only temporary, in accordance with the Rome I Regulation the ‘habitual place of work’ does not change and therefore neither does the applicable law, “if the posted worker does not have a habitual place of work, and moves from one country to another, the law of the country *where his employer is established* is applicable (which in cases of posting is the country of origin).”⁶⁸² This indicates that the situation might be even worse without the Directive in terms of respecting and applying the host State’s laws.

Another option would be to rely on a default arrangement such as the European Works Council Directive,⁶⁸³ “The default arrangement in this case must provide incentives for host-state workers/unions and home-state employers/unions to make agreements on the labour standards to apply to posted workers in the host

⁶⁸⁰ Davies, ‘Case C-346/06, *Rüffert v Land Niedersachsen* [2008] IRLR 467 (ECJ)’, op. cit., 294.

⁶⁸¹ Ibid.

⁶⁸² ETUC ‘A Revision of the Posting of Workers Directive: Eight proposals for improvement’, op. cit., 9.

⁶⁸³ Directive 94/45/EC of the Council of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, [1994] OJ L254/64.

state.”⁶⁸⁴ This idea has potential, in part, because the European Works Council Directive “is frequently cited as an example of a very successful attempt to Europeanise national labour law systems.”⁶⁸⁵ However, these Works Councils are limited to improving the right to information and consultation of employees in undertakings with at least 1,000 employees spread over at least two Member States, which would effectively invalidate all SMEs from participating in the opportunity of posting or receiving posted workers.

An alternative secondary legislation would be reliance on the Temporary Agency Work Directive,⁶⁸⁶ however, this would only, potentially,⁶⁸⁷ cover the scope of Article 1(3)(c) Directive on hiring out workers, thus, postings made under Article 1(3)(a) and (b) Directive that concern sending workers from the service provider to recipient or inter-company transfers would effectively be made redundant.

The final option considered here is the application of soft law mechanisms for harmonisation which can be used in areas where there are no competences to regulate, such as the open method of coordination (OMC). This could be coupled harmoniously with the concept that this area requires a greater flexibility in terms of the diverse national labour systems, “the bargaining system established in Sweden and other Nordic countries is often described as the model for ‘flexicurity’ currently being promoted by the European Commission. By requiring ‘universally applicable’ legislation the ECJ’s judicial activism may be seen as threatening not only autonomous collective bargaining structures in the Member States, but also the flexibility inherent in the European Social Model and, in particular, the Open Method of Coordination.”⁶⁸⁸ The OMC has sparked diverging opinions; whether arguments have been made in favour of the opportunities that it presents⁶⁸⁹ or have highlighted its shortfalls,⁶⁹⁰ this thesis submits that reliance on

⁶⁸⁴ Kilpatrick, ‘Internal Market Architecture and the Accommodation of Labour Rights: As Good as it Gets?’, *op. cit.*, 21.

⁶⁸⁵ Zahn, ‘The “Europeanisation” of labour law: can comparative labour law solve the problem?’, *op. cit.*, 84.

⁶⁸⁶ Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, [2008] OJ L327/9.

⁶⁸⁷ Temporary Agency Work Directive, Preamble [22], provides that it does not in any way alter the scope of the Posted Workers Directive.

⁶⁸⁸ Zahn, ‘The Viking and Laval Cases in the Context of European Enlargement’, *op. cit.*, 12.

⁶⁸⁹ Ashiagbor, ‘Soft Harmonisation: The ‘Open Method of Coordination’ in the European Employment Strategy’ (2004) *EPL*, 10(2): 305-332.

the OMC alone would not be a suitable solution as, politically, it would be unfeasible, “It would not satisfy major stakeholders and certain parties in the European Parliament.”⁶⁹¹ Also, a legislative intervention would provide for more legal certainty than a soft law approach and it would show a more committed response from the Commission.

In conclusion, the potential for ‘Solution Number Four: Remove the Directive Altogether’ does not carry enough weight as there is no suitable pre-existing alternative. The fact is that posted workers are a unique category of worker that require their own unique legislation. The purpose of this PhD has always been to find solutions that directly fix the identified issues of the Directive, therefore, unless the Directive itself is adequately amended to directly address those issues, any other proposed solution would ultimately be inadequate. In the same vein, Solution Number Two would be ineffectual as the proposed Enforcement Directive is incomplete and has succeeded in enforcing some of the issues and Solution Number Three is too conditional, uncertain and unknown. This thesis therefore submits that Solution Number One should be adopted in its entirety and added to this should be ‘Chapter VI: Cross-border Enforcement of Administrative Fines and Penalties’ from the proposed Enforcement Directive, under Solution Number Two, which would guarantee that workers receive the recovery that is due to them.

⁶⁹⁰ Hatzopoulos, ‘Why the Open Method of Coordination Is Bad For You: A Letter to the EU’ (2007) ELJ, 13(3): 309-342.

⁶⁹¹ Commission Staff Working Document SWD(2012) 63 final, op. cit., Section 6.8.3.

Conclusions

I. The Answer to the Research Question

The research question set out in the Introduction asks: how can the issues associated with the Posted Workers Directive⁶⁹² best be resolved? The answer to that question is to adopt the proposals set out under Solution Number One and added to that Chapter VI of the proposed Enforcement Directive, as prescribed by Chapter 3 of this thesis.

The law is a dynamic and constantly evolving subject, as such, my research question had to be flexible in order to reflect its movements. When I began this PhD my research question was “Should the Directive be Amended?” then, in my third year, the Commission published its proposal, confirming that there will be an amendment, in some form, regarding this legislation, consequently, my research question had to reflect this development and shifted to ask what that change should be. The contribution to knowledge presented in this PhD is my input to that current debate, and specifically, my contribution can be seen in the analysis of the issues, the original critique of the Court in *Laval*⁶⁹³ embodied in its failure to recognise that the elimination of Article 4(3) of the amended Proposal⁶⁹⁴ from the Directive affirms that the requirement to declare the applicability of collective agreements in the transposing national legislation is obsolete and finally, the presentation of my proposed solution to the identified issues.

This has been a very honest presentation of my ideas; every element is something that I truly believe in, even when it goes against the grain or what is presumed to be the right thing to do. For example, including a Monti Clause into the legislation, whether it be the primary or secondary legislation, would only change the direction of the problem; we need to break free from the pendulum and move forward. Including a provision for the going rate as opposed to the minimum rate would have the effect of eroding the commercial opportunities of posting workers abroad and is therefore not a realistic or thoroughly-considered

⁶⁹² Directive, op. cit.

⁶⁹³ *Laval*, op. cit.

⁶⁹⁴ Amended Proposal for Directive COM(1993) 225 final, op. cit.

proposal, in essence, it represents an immediate reaction to a one-dimensional representation of the problem. Yes, of course there are differing wage and labour standards across the Union but this thesis endorses that those differences should be embraced so that the real value of the EU can be realised. The commercial opportunities of employing cheaper temporary labour should not be discouraged, *provided*, that the social opportunities are equally embraced by providing greater flexibility and awareness of the diverging national labour systems including an acceptance of the different ways in which the terms and conditions of employment may be extended to posted workers and the ability of social partners to negotiate and fight for more favourable conditions. It is intended that these amendments will contribute to the Union's aim of establishing a genuine "social market economy"⁶⁹⁵ and thereby assist in finding balance between the competing interests of national and EU law and economic and social policies through the Directive.

II. Wider Issues

This PhD has focused on a case study, in the form of the Directive, in order to elicit the broader issues of the EU. The Directive is emblematic of the most pertinent and timeless issues of the Union: national versus Union law; economic versus social policies; and the threat of social dumping in an enlarging Union, exacerbated by the economic crisis, "Once perceived as a key instrument to prevent unfair competition on wages and working conditions in situations of temporary cross border provision of services, [the Directive] has now become the battle ground on which the fight about the social dimension of the internal market is fought."⁶⁹⁶

The Directive's issues bring to light the clash between economic and social rights of the Union and this thesis has proposed that rather than pitting these interests against one another, which pertains to a pendulum approach whereby the issues would repeat themselves back and forth, what is needed is an entirely new perspective of the normative value of these two concepts. The presumption to favour economic rights is rooted in the economic origins of the Union and therefore is rooted in the past. This thesis has been set out chronologically so as to

⁶⁹⁵ Article 3(3), TEU.

⁶⁹⁶ ETUC 'The Posting of Workers Directive: proposals for revision', op. cit.

document the fundamental changes and developments that have occurred in the EU over the last few years. The primary law has been amended and in the process has truly bolstered the significance of social rights. The evolution of EU law must be reflected in the way the law is discussed, analysed and interpreted. This thesis has intended to demonstrate that the key to attaining a social market economy is to rethink the role of social rights which should not be as a derogation or an exception, but a partner to economic trade. This may be viewed as an idealistic as opposed to a realistic approach in practice, as ultimately, the Court cannot merely say that both sides are of equal value; it must make a judgment. Therefore, the proportionality test is necessary in assisting the Court with this balancing process. In light of this new thinking, the results of the proportionality test should not automatically be assumed to fall in line with economic policies but there must be a genuine scope to balance the fundamental freedoms in the same way as fundamental rights. The primary intention is that this suggestion should influence a change in perspective to move on from the notion that the economic and social principles are inherently incompatible.

Subsequently, it is hoped that this ‘reboot’ of the Union’s “economic programming”⁶⁹⁷ will resonate in the context of Union versus national law. Ascertaining the place of national law in a Union context was explored through the discussion of public policy arguments implemented to protect the domestic labour market from social dumping, which has been worsened in this context by the minimum conditions maintained in the Directive. The arguments in this area are more complicated than the economic versus social paradigm as those elements both comprise the Union’s objectives, whereas protection of the national labour market could so easily be linked to national protectionism which is understandably precluded from the Union’s goals. Therefore, this clash of competing interests requires a more careful and deliberate phrasing in finding its solution. It is submitted that through emphasising the need to avoid social tensions resulting from disturbances on the labour market in order to protect both public and social policy this will enhance the overall competitiveness of the internal market and contribute to the Union’s aspirations for full employment and social

⁶⁹⁷ Lecomte, ‘Embedding Employment Rights in Europe’, op. cit., 17.

progress.⁶⁹⁸ Therefore, by incorporating the Union's objectives, the argument for protecting the Member States' interests will be strengthened.

III. Final Comments

The Directive has been an incredibly useful tool to examine all of the major issues that I was most interested in researching. The Directive is also very compelling in and of itself as the specific problems continue to be raised across the Member States,⁶⁹⁹ revealing that the issues remain and the solution continues to be sought-after. Subsequently, my final question in respect of attaining the proposed solution to the Directive has to be: is there currently the political will for change?

“If we examine the history of the [posting] debate, it becomes very clear that national positions only shifted in favour of the Directive if there was an urgent ‘political’ need at home. When the European Community was enlarged with Portugal and Spain in 1986, public debates about the influx of Iberian workers created a climate for legislation... Later on, the fall of the wall in Berlin and the opening to the East created again an atmosphere where initially ignorant politicians realised that ‘something had to be done’.”⁷⁰⁰

The political will for change must be present in order for anything to happen, however the Commission has determined that the current political feasibility of undertaking a wide-ranging review of the Directive is low as the “political debate remains polarised.”⁷⁰¹ The only development provided by the Commission has been the proposed Enforcement Directive which clearly shows a lack of political

⁶⁹⁸ Article 3(3), TEU.

⁶⁹⁹ The recent Irish Supreme Court ruling *McGowan & ors v Labour Court Ireland & ors* [2013] IESC 21, declared that the system of Registered Employment Agreements in Ireland is unconstitutional. The system provides for a mechanism whereby general sectoral agreements setting employment terms can be made legally enforceable and the Supreme Court held that this is invalid in regard of Article 15.2.1 of the Irish Constitution, “The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas [the Parliament of the Republic of Ireland]; no other legislative authority has power to make laws for the State.”

⁷⁰⁰ Cremers, Dølvik and Bosch, ‘Posting of workers in the single market: attempts to prevent social dumping and regime competition in the EU’, op. cit., 527.

⁷⁰¹ European Commission Final Report: ‘Preparatory study for an Impact Assessment concerning the possible revision of the legislative framework on the posting of workers in the context of the provision of services’ (2012) Ismeri Europa, 107.

will for change as it fails to address the substantive issues at the heart of the problem. In the national context, with the UK as an example, there is a “current lack of interest expressed in this issue by any of the major UK political parties.”⁷⁰²

In conclusion to my final question, the answer is that currently there is not the political will for change. Nevertheless, it is determined that we need proposals in place in order to be able to inform the political process of thoroughly considered suggestions that take the interests of all major stakeholders into account, so that when the time is more opportune, an effective legislative solution may be realised.

⁷⁰² Novitz, ‘UK Implementation of the Posting of Workers Directive’ in Evju (Editor), *Cross-Border Services, Posting of Workers, and Multilevel Governance* (2013) University of Oslo, 354.

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